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In The

Supreme Court of the United States

MARSHALL COLEMAN, *et al.*,

Petitioners,

vs.

AMERICAN TYPE CULTURE COLLECTION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Sup. Ct. R. 14.1 (a)

Petitioners are Gulf War Veterans saddled with documented physical and emotional injuries arising from their exposure to biological and chemical agents during the Iraqi-Kuwaiti war. Respondent is a company that enabled Iraq by furnishing it, in part, with biological agents needed to manufacture biological and chemical weapons, including strains of Anthrax. Petitioners have attempted to bring the enabler to justice through the only means available – the United States court system – only to be frustrated by a judicial ruling that a mail-order company's routine and systematic sales to customers located within the forum state can be ignored if the company's printed sales contracts happen to include an F.O.B. (free on board) clause. For the veterans, a commercial risk of loss provision has transmogrified into a *realized loss*.

Petitioners ask the Court to resolve the following question:

> When considering a nonresident company's amenability to personal jurisdiction under the concept of general jurisdiction, should the fact that the non-resident company's sales to the forum state were made on an F.O.B. (free on board) basis negate those multitude of sales in the Constitutional analysis and outweigh other evidence that the nonresident company has purposefully established minimum contacts with the forum state?

PARTIES TO THE PROCEEDING

Sup. Ct. R. 14.1 (b)

Petitioner Marshall Coleman is the lead plaintiff of a group of over 1,800 named Plaintiffs and Intervener-Plaintiffs who served in the military on behalf of the American people in the 1990-91 Gulf War with Iraq. Their participation in the war caused them to be exposed by the forces of Iraq to chemical and biological weapons. Petitioners have provided the Court with a complete list of the named Petitioners at Appendix E. Petitioners have made class allegations under Texas Rule of Civil Procedure 42 and estimate that the total number of potential class members is between 50,000 and 100,000 men and women of the U.S. armed services.

Respondent American Type Culture Collection, Inc. ("ATCC") is a company that sells cultures of microorganisms including Anthrax, and provides services such as safe depositories for organisms and related materials. ATCC is organized under the laws of the District of Columbia with its headquarters in Rockville, Maryland. ATCC is known to have aided Iraq to procure some of the microbiological materials necessary to ultimately develop biological and chemical weapons.

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PETITION FOR WRIT OF CERTIØRARI

Petitioners Marshall Coleman, *et al.*, respectfully petition this Court for a writ of certiorari to review the decision of the Supreme Court of Texas (Appendix A) as to this important issue of federal Constitutional law impacting the military and civilian veterans of the Gulf War.

OPINIONS BELOW

Sup. Ct. R. 14(d)

1. The 23rd District Court of Brazoria County, Texas, denied Respondent ATCC's Special Appearance in an unpublished order dated December 15, 1998. Appendix D.

2. The Court of Appeals for the First District of Texas affirmed the trial court's decision in a published opinion, ***American Type Culture Collection, Inc. v. Coleman***, 26 S.W.3d 37 (Tex. App. – Houston [1st Dist.] 2000). Appendix B.

3. The Texas Supreme Court reversed the decision of the appeals court in a published opinion, ***American Type Culture Collection, Inc. v. Coleman***, 83 S.W.3d 801 (Tex. 2002). Appendix A.

4. The Texas Supreme Court denied Petitioners' motion for rehearing on September 12, 2002 in an unpublished letter. Appendix C.

JURISDICTION

Sup. Ct. R. 14.1(e)

This Court has jurisdiction over this Petition because a state court of last resort has interpreted the minimum contacts doctrine that was announced by this Court in *International Shoe v. Washington*[1] in a manner conflicting with that very case, and in conflict with the decisions of the United States Courts of Appeals.[2] Significantly, the Texas Supreme Court has held that the broad language of the Texas long arm statute's "doing business" requirement allows the statute to reach as far as the federal constitution permits thus making a Texas court's application of the standard an exercise in applying federal law.[3] Nevertheless, in this case, the Texas Supreme Court treated boilerplate F.O.B. (free on board) terms contained within a mail-order sales contract as being of overriding importance in resolving the issue of personal jurisdiction, rather than either simply considering the F.O.B. term as but one minor factor in analyzing a mail-order company's actual presence in a state as employed by this Court in *International Shoe;* or, as no factor at all, as determined by several of the United States Courts of Appeals. The Texas Supreme Court's inexplicable deference to the F.O.B. terms lead that court to discount or ignore the Respondent's overwhelming

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[1] 326 U.S. 310 (1945).

[2] Sup. Ct. R. 10(b) (providing for this Court's jurisdiction in situations where a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States Court of Appeals.").

[3] *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex.1991).

contacts with Texas, including annual sales to over 200 customers contained in thousands of invoices, and decide the issue incorrectly.

CONSTITUTIONAL AMENDMENT INVOLVED

Sup. Ct. R. 14.1(f)

1. U.S. CONSTITUTION, amend. 14, section 1.

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Sup. Ct. R. 14.1(g)

I. Nature of the Case

Petitioners consist of the men and women of the United States armed forces who, during their military service in Iraq and Kuwait during the 1990-91 Gulf War, were subjected to biological and chemical weapons.[4] They

[4] Appendix E contains a list of the names of the approximately 1800 named Petitioners.

have suffered severe and disabling injuries as a result of this exposure.

Through pretrial discovery, Petitioners have assembled convincing evidence that several companies – including Respondent – helped Iraq construct the foundations of a chemical and biological weapons program by furnishing it with goods, know-how, or both. These companies placed profit before the safety of nations, endangering the lives of our military personnel and perhaps leading to the possibility of bio-terrorist attacks on the U.S. homeland. ATCC is known to have provided Iraq with biological agents of destruction, including strains of Anthrax.

As a result of the foreseeable personal injuries that arose from the Defendants' negligent and intentional conduct, Petitioners filed suit alleging negligence and intentional misconduct in Defendants' business dealings with Iraq. Several of the Defendants, notably ATCC, challenged the trial court's personal jurisdiction over them, leading to this litigation.

This Petition presents this Court with the issue of a court's Constitutional ability to exercise general personal jurisdiction over a mail-order company – which while incorporated and headquartered out of the forum state – nevertheless maintained a continuous and systematic series of sales to (as well as purchases from) customers located within Texas. The record establishes that ATCC annually sold approximately $350,000 worth of biological material and services to more than 200 Texas-based companies spanning an 18-year period. While the Texas trial and intermediate appellate courts each found that the evidence of the Respondent's 18 years of continuous and systematic sales was a valid foundation for the assertion of

jurisdiction, the Texas Supreme Court discounted this evidence on grounds that the sales were apparently made on a "free on board" basis.[5] The exaggerated importance of the terms of the sales contracts given by the Texas Supreme Court effectively allowed a company that helped furnish Iraq with the components of germ warfare to escape a liability claim on the rather meager ground that the form sales contracts included a typical, insurance-focused risk-of-loss provision that read: "F.O.B. Rockville, Maryland."

II. Procedural Background

The named Petitioners are approximately 1800 American veterans of the 1991 Persian Gulf War who were exposed to harmful biological and chemical materials while serving in Iraq and Kuwait. Petitioners have brought class allegations under Texas Rule of Civil Procedure 42 and estimate that the total number of potential additional class members is between 50,000 and 100,000. The named Petitioners reside in most all of the States and Territories of the United States.

On June 6, 1994, Plaintiffs/Petitioners filed suit against more than 80 Defendants, including Respondent American Type Culture Corporation, Inc. (ATCC) – a

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[5] Petitioners have consistently disputed the presence of F.O.B. terms in all of the relevant ATCC sales contracts and, in fact, provided evidence of terms that included free-on-board designations for Texas. However, the Texas Supreme Court (Appendix A-9) concluded that "the sales were shipped F.O.B. from Rockville, Maryland." Accordingly, Petitioners will accept the Texas Supreme Court's characterization as being true solely for purposes of this review.

District of Columbia corporation with its headquarters in Maryland. Suit was filed in the 23rd District Court of Brazoria County, Texas. CR at 2-9. Some of the Defendants removed the case to the United States District Court for the Southern District of Texas, Galveston Division, but the federal district court eventually remanded the case for lack of subject-matter jurisdiction. 28 U.S.C. § 1447(c); CR at 20, 29-31.

After remand, ATCC filed a special appearance – the Texas legal vehicle by which a nonresident challenges the trial court's imposition of personal jurisdiction. Supp. CR at 8; TEX.R.CIV.P. 120a. After reviewing the evidence, the trial court concluded that ATCC was indeed subject to *in personam* jurisdiction of the Texas courts and denied the special appearance on December 15, 1998. Appendix D. ATCC thereafter filed an accelerated appeal of the jurisdictional issue as is allowed under Texas practice.[6]

On May 18, 2000, the Texas First Court of Appeals affirmed the trial court's decision in a published opinion. Appendix B, *American Type Culture Collection, Inc. v. Coleman*, 26 S.W.3d 37 (Tex. App. – Houston [1st Dist.] 2000). On August 31, 2000, the appellate panel denied ATCC's motion for panel rehearing, and all but one of the nine Justices of the First Court of Appeals denied ATCC's motion for rehearing *en banc*. 26 S.W.3d at 53.

ATCC then filed a Petition for Review in the Texas Supreme Court, which in a published opinion dated July 3, 2002, reversed the judgment of the Court of Appeals.

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[6] TEX.CIV.PRAC. & REM. CODE § 51.014(7) (Vernon Supp. 2002).

Appendix A, *American Type Culture Collection, Inc. v. Coleman,* 83 S.W.3d 801 (Tex. 2002). The Texas Supreme Court denied Petitioners' Motion for Rehearing on September 12, 2002. Appendix C.

This Petition for Writ of Certiorari followed.

III. Facts

Petitioners' case against Respondent ATCC rests on general, rather than specific, jurisdiction. In brief, ATCC should be subject to the call of a Texas court because, for at least 18 years, it has continuously and systematically sold a large number of its goods to a significant number of Texans and has so marketed itself. ATCC is a mail-order business that "sells biological research material to research institutes and commercial manufacturers throughout the United States and in forty-five countries." Appendix A at 2-3.

The record establishes that, at the relevant times to this suit, ATCC earned a substantial portion of its revenues from:

1.) **selling** its goods and services to over 200 Texas-based customers over an 18-year period, and

2.) **purchasing** approximately $378,000 of supplies from 33 Texas-based customers.

The number and dollar amounts of ATCC's sales and purchases are established in the record, recited in the published opinions, and are outlined in this Petition. ATCC has never challenged their accuracy. Rather, ATCC's argument is that these sales are not relevant. While the trial and intermediate courts properly considered the

evidence of ATCC's continuous and systematic sales to Texas customers spanning eighteen (18) years, the Texas Supreme Court discounted this evidence due to the presence of the "free on board" shipping terms that were supposedly contained in the contracts.

In addition to what the lower courts called ATCC's "bedrock" sales and purchases contacts, ATCC's other contacts with Texas also include:

3.) serving as a **repository** for Texas-based researchers seeking patents, as well as serving as a **safe-depository** for microorganisms shipped by Texas-based customers;

4.) entering into **contracts** with Texas-based customers regarding propagation and testing of cell lines; and

5.) attending five scientific **conferences** in Texas.

Appendix A-9, A-10. These contacts were adjunct to ATCC's regular continuous and systematic sales and purchases that are described above.

The trial and the intermediate court of appeals concluded that ATCC's repeated and continuous sales and purchases – combined with ATCC's adjunctive business activities in Texas (*i.e.*, the advertising, conferences, and serving as a repository for genetic materials from Texas patent holders) – constituted "continuous and systematic contacts" with Texas sufficient to uphold the Texas court's imposition of personal jurisdiction. See Appendix B and Appendix D. The Texas Supreme Court disagreed, however, concluding that ATCC's contacts were insufficient. Appendix A. *The chief difference in the Texas Supreme*

Court's approach was the fact that it discounted all evidence of ATCC's 18-years of sales to Texas customers on grounds that F.O.B. terms effectively transferred the sale out of state.

* * *

In order to allow this Court to assess the entire jurisdictional picture, Petitioners outline the evidence presented below.

1.) ATCC's regular sales of goods, over 18 years, to Texas-based customers.

As proven by the testimony of chief financial officer Robert Walden, ATCC regularly engaged in business in Texas by selling its goods to Texas consumers.[7] Mr. Walden testified that ATCC sold its products in Texas for at least the 13 years he was employed by ATCC.[8] Moreover, William S. McKay – ATCC's department head for sales and marketing – testified that ATCC has done business with Texas customers for at least the previous 18 years he was employed by ATCC.[9]

Not only did ATCC do business with Texas-based customers for at least the past 18 years, but this business grew over that period.[10] Sales in Texas unquestionably account for approximately 3.5 percent of ATCC's worldwide sales of its full product line and over 5 percent of

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[7] PX-A (Robert Walden depo.) at 39, 41-46.

[8] PX-A (Walden depo.) at 39.

[9] PX-B (William McKay depo.) at 27-28.

[10] PX-B (McKay depo.) at 56.

ATCC's active customers in the U.S.[11] Texas customers account for over 5 percent of ATCC's U.S. sales.[12]

Walden conceded ATCC's sales were "not sporadic", but rather were "repetitive" and probably continuous on a monthly basis.[13] Indeed, a review of the over 2,000 invoices for the period of July 1, 1989 through June 30, 1994 reveals that ATCC has regular, repeat customers in Texas that consistently order goods. Given these over 2000 invoices, one cannot legitimately characterize these sales as "fortuitous," "random," or "sporadic" and the lower courts correctly so concluded. As proven by its officers' testimony and confirmed by over 2000 ATCC invoices contained in the record, ATCC entered into a multitude of contracts for the sale of culture samples and biological materials that required delivery to consumers at addresses throughout Texas. A partial list of ATCC's regular Texas-based customers includes:

* Abilene Christian University, Abilene, Texas
* Alcon Laboratories, Inc., Fort Worth, Texas
* Aquaterra Biochemistry, Inc., Lancaster, Texas
* Austin College, Sherman, Texas
* Stephen F. Austin State University, Nacogdoches, Texas
* Armstrong Labs, Inc., Fort Worth, Texas
* Johnson & Johnson Medical, Inc., Arlington, Texas
* Austin Biological, Austin, Texas
* Austin Community College, Austin, Texas
* Angelo Community Hospital, St. Angelo, Texas

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[11] PX-A (Walden depo.) at 216-217.

[12] PX-A (Walden depo.) at 220-222.

[13] PX-A (Walden depo.) at 200-202; PX-B (McKay depo.) at 28-29.

* Agroplus, Inc., Hawkins, Texas
* American Association of Bioanalysts, Brownsville, Texas
* All Saints Episcopal Hospital, Fort Worth, Texas
* American Animal Health, Inc., Grand Prairie, Texas
* AMI Central Division, Odessa, Texas
* Applied Microbiological Service Inc., College Station, Texas
* Abbott Laboratories, Austin, Texas
* Baylor College of Medicine, Houston, Texas
* Bexar County Hospital District, San Antonio, Texas
* PSI Biosearch Lab, Arlington, Texas
* A.M. Biotechnics, Inc., Belton, Texas
* Burzynski Research Institute, Houston, Texas
* Bexar County Hospital, San Antonio, Texas
* Baylor University, Waco, Texas
* Baylor University Medical Center, Waco, Texas
* Baylor University Medical Center, Dallas, Texas
* Betz Labs, The Woodlands, Texas
* Baxter H.C., Inc., El Paso, Texas
* Coca-Cola Foods, Houston, Texas
* Carroll Co., Garland, Texas
* Cook Children's Hospital, Fort Worth, Texas
* Citizens General Hospital, Greenville, Texas
* Dallas County Community College District, Mesquite, Texas
* Dow Chemical Company, Freeport, Texas
* Dallas County Hospital District, Dallas, Texas
* University of Dallas, Dallas, Texas
* DPT Laboratories, Inc., San Antonio, Texas
* Driscoll Childrens' Hospital, Corpus Christi, Texas
* Detox Industries, Inc., Sugar Land, Texas
* E. I. Du Pont de Nemours & Company, Beaumont, Texas
* Dynatech Scientific Labs, El Paso, Texas
* Denton Community Hospital, Denton, Texas
* Design Foods, Lampasas, Texas

* East Texas State University, Commerce, Texas
* El Paso Water Utilities, El Paso, Texas
* Equitech International, Ungram, Texas
* Cancer Therapy & Research Center, San Antonio, Texas
* City of Lubbock Department of Health, Lubbock, Texas
* Fritz Chemical Co., Dallas, Texas
* Fairleigh Dickinson Labs, Abilene, Texas
* Frito Lay, Carrollton, Texas
* Fast All Parts, Inc., The Woodlands, Texas
* Frio Hospital, Pearsall, Texas
* Food and Drug Administration, Dallas, Texas
* Formosa Plastics Corp., Laward, Texas
* Gamma Biologicals, Inc., Houston, Texas
* Granada Genetics, Inc., College Station, Texas
* Gustafson, Inc., Dallas, Texas
* Genescreen, Inc., Dallas, Texas
* Gilmer Animal Clinic, Gilmer, Texas
* Graham General Hospital, Graham, Texas
* Genetic Screening & Counseling Service, Inc., Denton, Texas
* Greenharbor Medical Corp., Houston, Texas
* Genemedicine, Houston, Texas
* University of Houston, Houston, Texas
* Hermann Hospital, Houston, Texas
* Harris Hospital, Fort Worth, Texas
* Hood General Hospital, Granbury, Texas
* Harrington Cancer Center, Amarillo, Texas
* Houston Biotechnology, The Woodlands, Texas
* University of Houston at Clear Lake, Houston, Texas
* Infectious Disease Research Institute, Houston, Texas
* Incarnate Word College, San Antonio, Texas
* Immunotherapeutics, Inc., Houston, Texas
* Inland Laboratories, Austin, Texas

* Thomas J. Stephens & Associates, Carrollton, Texas
* Inmasco Corp., Brownsville, Texas
* Integrated Dairy Service, Inc., Dublin, Texas
* International Trading & Supply, Houston, Texas
* I.D.O. Company, Brownsville, Texas
* Institute of Biologic Research, Houston, Texas
* Jasper Memorial Hospital, Jasper, Texas
* JCS International, El Paso, Texas
* Jarvis Christian College, Hawkins, Texas
* Jet Export Import Service, Rancho Virjo, Texas
* ACT Laboratories, Inc., Houston, Texas
* Mary Kay Cosmetics, Inc., Manufacturing Div., Dallas, Texas
* Kimberly Clark Corp., Waco, Texas
* Krug Life Sciences, Inc., Houston, Texas
* KVM Biotechnology, Inc., Houston, Texas
* Kiser Engineering, Inc., Segin, Texas
* Key Scientific Products, Round Rock, Texas
* Kaiser Permanente, Dallas, Texas
* Laredo Community College, Laredo, Texas
* Lamar University, Beaumont, Texas
* Life Cell, The Woodlands, Texas
* Lubbock General Hospital, Lubbock, Texas
* Baker Sanger, Inc., Houston, Texas
* Cytoclonal Pharmacy, Inc., Dallas, Texas
* Meridian Bio-Medical, Inc. Round Rock, Texas
* Mohawk Laboratories, Inc., Irving, Texas
* McAllen Medical Center, McAllen, Texas
* Medical Laboratories, Inc., Denton, Texas
* Methodist Hospital, Houston, Texas
* Maknur Laboratories, Inc., Houston, Texas
* Medical Center Hospital, Odessa, Texas
* Memorial Medical Center, Corpus Christi, Texas

This list of 107 customers is slightly less than one-half of ATCC's Texas customer list; the remainder includes customers including several branches of the University of

Texas, the U.S. Army's Fort Sam Houston, Veterans Administration hospitals, SeaWorld of Texas, Shell Development Co., and Texas A&M University. ATCC's average Texas sales for a typical one-year period total approximately $350,000. See Appendix A-9.

The intermediate appellate court found these sales were a "bedrock" basis of the jurisdiction. Appendix B-33. However, the Texas Supreme Court found that these sales were made "F.O.B. Rockville, Maryland" and then used this fact finding to determine that these sales "cannot properly be characterized as a 'bedrock' fact that supports jurisdiction." Appendix A-11. This Petition seeks to correct that error.

2.) Regular purchases from Texas vendors.

In addition to selling its goods to Texas-based companies, ATCC buys supplies and media (*i.e.*, food for cultures) from approximately 33 vendors located throughout Texas. These Texas vendors[14] include:

* Novagraph, Dallas, Texas (Exhibit PX-C)
* Midland Certified Reagent Co., Midland, Texas (PX-D)
* Inmac, Dallas, Texas (PX-E)
* Ambion, Inc., Austin, Texas (PX-F)
* AquaTerra Biochem. Corp. of America, Lancaster, Tex. (PX-G)
* Laboratory Animal Training Assoc., Fort Worth, Texas (PX-I)

[14] A complete list of ATCC's Texas-based customers is found at the exhibits listed after the customer's name.

* Double M Industries, Austin, Texas (PX-J)
* City of Houston Dept. of Health, Houston, Texas (PX-K)
* Biotecx Laboratories, Inc., Houston, Texas (PX-N)
* Gamma Biologicals, Inc., Houston, Texas (PX-M)

Again, this is approximately one-half of ATCC's vendor's list.[15]

The trial and intermediate appellate courts found this evidence of purchases supported the exercise of personal jurisdiction over ATCC. Appendix B and D. After concluding that the evidence of ATCC's sales was legally irrelevant due to the presence of the F.O.B. provisions (see above), the Texas Supreme Court recited that "purchases and trips related thereto, even if they occur regularly, are not, **standing alone**, a sufficient basis for the assertion of jurisdiction."[16] Of course, the Texas Supreme Court found these contacts to be standing alone *because it discounted the evidence of the sales as shown above*. This Petition for writ of certiorari seeks to correct that error.

3.) Regular services offered by ATCC to Texas consumers

The record additionally reflects that ATCC offered its services to Texas customers, including:

(1) a patent repository for customers seeking patents on micro-organisms;

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[15] A complete list of the customers in Texas from which ATCC made purchases is found at Exhibit 19 to PX-A (Walden deposition).

[16] 83 S.W.3d at 808, *citing Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 n. 3 (5th Cir. 1990) (emphasis added).

(2) freeze-drying services for micro-organisms; and

(3) identification of micro-organisms services.

Over the past 15-20 years, Texas customers have, on average, accounted for approximately 2.7 percent of the total worldwide deposits in ATCC's patent repository.[17] Texas customers have, on average, accounted for approximately 3.5 percent of ATCC's micro-organism service business. For example, the invoices attached to Plaintiffs' response as Plaintiffs' Exhibit A, no. 17, reflect that the following Texas-based companies made regular use of ATCC's organism preservation and patent repository services between 1989 and 1994:[18]

* Arnold, White & Durkee (law firm), Houston, Texas
* Baylor College of Medicine, Houston, Texas
* E. I. DuPont Nemours & Co., Beaumont, Texas
* Fulbright & Jaworski (law firm), Houston, Texas
* Gamma Biologicals, Inc., Houston, Texas
* Houston Biotechnology, The Woodlands, Texas

Moreover, pursuant to such safe-deposit agreements, ATCC solicited further business inside Texas from Texans; for example, in 1993, it sent the following correspondence to Gamma Biologicals at 3700 Mangum Road in Houston:

> The safe deposit agreement covering your culture material SD 1104-1106 will expire November 15, 1993.

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[17] PX-A (Walden depo.) at 80, 94-96, and 89-90, 95-97, 227-229, 246-247 and 249.

[18] PX-A no. 17; P-X M at 26 (Safe Deposit Agreement with Gamma Biologicals of Houston, Texas).

> To renew the contract for an additional 3 years . . . the fee is . . . a total of $900. We need a purchase order number to invoice you for the service. . . .
>
> Enclosed are two originals of a new Safe Deposit Contract. Please sign one original and return it to me if you are in agreement with these terms.[19]

Such invoices and correspondence further reflect that ATCC is regularly conducting business with Texas customers (indeed, initiating it) and exploiting the Texas market for profit and regularly communicating with those in Texas. The trial and intermediate appellate courts found this evidence supported the exercise of personal jurisdiction over ATCC. Appendix B and D. In contrast, the Texas Supreme Court, however, chose to focus solely on the *contract basis* of these contacts, and discounted them on this narrow ground; moreover, the court had previously found that the evidence of ATCC's regular sales could not be properly considered, and hence, these contacts were viewed in that light. This Petition for writ of certiorari seeks to correct that error.

4.), 5.) Evidence of ATCC's signing of Contracts with Texas-based entities; and Evidence of ATCC's presence at Texas-based conferences

Petitioners presented considerable evidence below that ATCC signed contracts with Texas-based entities whereby it agreed to be bound by Texas law, and that ATCC attended five trade conferences in Texas. In candor,

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[19] PX-M at 30.

and as recognized by the lower courts, this evidence was not the "bedrock" of the jurisdictional equation; rather, it was considered in addition to all the other evidence (including that of the sales). The trial and intermediate appellate courts found this additional evidence supported the exercise of personal jurisdiction over ATCC. Appendix B and D. However, the Texas Supreme Court did not find this evidence dispositive of the issue given the unavailability of the evidence of sales. Appendix A.

* * *

The jurisdictional facts recounted above – taken together – establish that ATCC has continuous and systematic business contacts with the State of Texas. As observed by the First Court of Appeals, the evidence of ATCC's 18 years of continuous sales constitutes the "bedrock" for this conclusion. Appendix B-33. These sales – *combined with its other contacts* – constituted a general presence that was sufficient to sustain a finding of jurisdiction. The sales are conclusive evidence that ATCC purposefully directed its business activities toward Texas and to those inside Texas, so that the exercise of general jurisdiction would not violate traditional conceptions of due process. To determine otherwise would make it virtually impossible for a Plaintiff suing a mail order company outside its home state to establish general personal jurisdiction over that company. However, once the Texas Supreme Court eviscerated the evidence of ATCC's 18 years of regular sales, the remaining evidence was seen as insubstantial. This Court should correct that mistake.

REASONS FOR REVIEW

Reason 1: The Texas Supreme Court gave what was, in effect, conclusive effect to the "free on board" risk of loss terms that were apparently contained in the sales contracts.

The Texas Supreme Court's determination that ATCC was not subject to the personal jurisdiction of the Texas courts was based on the application of a legally questionable approach, which sets a dangerous precedence in the law of personal jurisdiction and is in conflict with the approach used by this Court and the United States Courts of Appeals. The Texas Supreme Court has held that the broad language of the Texas long arm statute's "doing business" requirement allows the statute to reach as far as the federal constitution permits, thus making a Texas court's inconsistent application of the personal jurisdiction formula a significant issue of federal law.[20] Thus, the Texas court's decision in this case transcends state law to become an issue of federal concern.

The Texas Supreme Court's approach in the case at bar strongly suggests that the mere presence of stock F.O.B. terms in a sales contract may ultimately decide a jurisdictional inquiry. Appendix A-11. Such an approach is deleterious to the law of personal jurisdiction because it gives unintended meaning to what otherwise would be a simple "risk of loss" term. The Texas Supreme Court gave what, in the terms of this case, was conclusive effect to the commonplace "free on board" shipping provisions contained

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[20] *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex.1991).

in the sales contracts. Appendix A-11. The court concluded that "title passing outside of Texas" is a factor that weighs against a finding that Texas has general jurisdiction. . . . " Appendix A-11.

The heightened importance to F.O.B. terms conflicts with the approaches used by the federal courts and is thus of interest to this Court.[21] For example, this Court has considered F.O.B. terms when analyzing jurisdiction, but has sensibly treated them as a mere factors to be considered in the overall jurisdictional picture. In *International Shoe v. Washington*, this Court noted the presence of F.O.B. terms in a sales contract, yet ultimately found that the Defendant in question could be nevertheless subject to the jurisdiction of another state (Washington).[22] In other words, this Court obtained a realistic, overall view of the contacts and was not preoccupied with the mere presence of the risk-of-loss provision in a shipping contract.

Guided by this Court's approach in *International Shoe*, several United States Circuit Courts of Appeals have declined to give conclusive effect to F.O.B. terms contained in shipping contracts when considering issues of personal jurisdiction.[23]

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[21] Sup. Ct. R. 10(b).

[22] 326 U.S. at 314 (the fact that the Defendant approved the right to approve all sales at its St. Louis office and shipped products F.O.B. from points outside Washington did not remove jurisdiction from Washington courts.)

[23] *See, e.g., Cambridge Literary Properties, Ltd. v. Goebel Porzellanfabrik*, 295 F.3d 59, 63-64 (1st Cir. 2002) ("The shipment of large quantities of goods into a state, even F.O.B. can satisfy the minimum contacts prong of the due process inquiry"); *Oswalt v. Scripto*, 616 F.2d

(Continued on following page)

In this case, the Texas Supreme Court's exaggerated emphasis on the stock shipping terms meant that it ignored the considerable evidence of ATCC's 18 years of sales to its Texas-based customers. The court's statement (Appendix A-11) that "title passing outside of Texas is a factor that weighs against a finding that Texas has general jurisdiction" contradicts this Court's approach in *International Shoe* and that of the federal appeals courts cited above. While an F.O.B. notation may be *considered* by a court, the Texas Supreme Court's reliance on it to, in effect, ultimately decide the issue is contrary to this Court's teachings and the approaches used by the United States Court of Appeals. This Court should grant the writ of certiorari, or remand with appropriate instructions, to correct this incorrect application of law.

Reason 2: Given its erroneous treatment of the evidence of continuous sales, the Texas Supreme Court improperly discounted the remaining jurisdictional evidence.

The evidence in this record – *taken as a whole* – establishes that ATCC has significant, purposeful contacts with Texas. Based on the quantity and volume of its sales and purchases in Texas, ATCC purposefully availed itself of the privilege of conducting business within Texas, thus invoking the benefit and protection of Texas law, and fully justifying the trial court's conclusion that ATCC is subject

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19, 197, n. 8 (5th Cir. 1980) ("[J]urisdiction does not depend on the technicalities of when title passes."); *Vencedor Mfg. Co. v. Gougler Indust. Inc.*, 557 F.2d 886, 890-91 (1st Cir. 1977) (shipment of large quantities of goods into state, even F.O.B., can satisfy minimum contacts prong of due process inquiry).

to the call of a Texas court. Based on these factors, the trial court and the First Court of Appeals correctly found jurisdiction. As found by the First Court of Appeals, the evidence of ATCC's 18 years of sales to Texas was a bedrock fact; the remaining evidence was adjunctive in nature.

The Texas Supreme Court, however, disallowed the evidence of ATCC's sales, and thus further discounted the evidence of ATCC's adjunctive contacts because it considered them without the benefit of the complimentary evidence of sales. ATCC's other contacts must be properly considered *in conjunction with the evidence of its 18 years of sales to Texas based customers.*

CONCLUSION

This Court should grant the Petition for Writ of Certiorari, and hear this case on its merits. Respondent ATCC has long conducted business in Texas through its repeated purchases and sales, and as such, it should be fairly expected to stand trial in a Texas court. Petitioners request all relief to which they are justly entitled.

Respectfully submitted,

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APPENDIX A

83 S.W.3d 801

Supreme Court of Texas.

AMERICAN TYPE CULTURE COLLECTION, INC., Petitioner,

v.

Marshall COLEMAN, et al., Respondents.

No. 00-0959.

Argued on Feb. 13, 2002.
Decided July 3, 2002.
Rehearing Denied Sept. 12, 2002.

Randy Edward Moore, The Moore Law Firm, Angleton, Samuel M. Sipe, Jr., Steptoe & Johnson, Washington, DC, Gordon R. Pate, Joe Michael Dodson, Pate and Dodson, Beaumont, for Petitioner.

H. Ronald Welsh, Thad T. Dameris, Vinson & Elkins, William Key Wilde, Tracie J. Renfroe, Michael Vincent Young, Bracewell & Patterson, J. Palmer Hutcheson, Gardere Wynne Sewell & Riggs, Kenneth Tekell, Tekell Book Matthews & Limmer, John T. McDowell, McDowell Collmer, Francis I. Spagnoletti, Spagnoletti & Associates, Timothy F. Lee, Ware Snow Fogel & Jackson, LLP, H. Daniel Spain, Melanie Virginia Waggoner, Spain & Hastings, Kathy D. Patrick, Gibbs & Bruns, Tom Bayko, Bayko Gibson Carnegie Hagan Schoonmaker & Meyer, Ronald E. Cook, Cook & Roach, Andrew R. Harvin, Doyle Rider Restrepo Harvin & Robbins, L.T. "Butch" Bradt, L.T. Bradt, P.C., Marc A. Sheiness, Sheiness Scott, et al., Otway B. Denny, Jr., Samuel E. Stubbs, Fullbright & Jaworski, C. Ed Harrell, Hughes, Watters & Askanase, John G. Bissell, John W. Bridger, Strong Pipkin Nelson Bissell & Ledyard, John A. Irvine, Porter & Hedges,

Murray Fogler, McDade Fogler Maines, Phillip Dye, Jr., Vinson & Elkins, Peter E. Strand, James T. Liston, Jerry Von Sternberg, Gary R. Proctor, Karan Cummings Ciotti, Houston, John R. Gilbert, Gilbert & Moore, Angleton, Stephen R. Lewis, Jr., Lewis & Williams, Galveston, James E. (Buster) Brown, Law Offices of James E. "Buster" Brown, Vaughan O. Stewart, Lake Jackson, John Arthur Eaves, Jackson, MS, Carlos Garza, Texas City, Brian J. Hurst, Mark D. Taylor, Baker & McKenzie, Jerald Michael Rasansky, Dallas, Mitchell A. Toups, Steven C. Toups, Weller Green Toups & Terrell, Beaumont, Andrew Robert Spector, Miami, FL, for Respondent.

Justice JEFFERSON delivered the opinion of the Court.

The issue in this interlocutory appeal is whether a Texas court may, consistent with due process, exercise *in personam* jurisdiction over American Type Culture Collection ("**ATCC**") in this case. The trial court found that **ATCC** had sufficient minimum contacts with Texas to justify the exercise of personal jurisdiction. The court of appeals agreed and affirmed the trial court's judgment. 26 S.W.3d 37. We granted **ATCC's** petition for review to consider whether the trial court erred in denying **ATCC's** special appearance. We reverse the court of appeals' judgment and render judgment dismissing the case against **ATCC** for lack of personal jurisdiction.

I.

ATCC, a nonprofit research organization, serves as a long-term repository center for living microorganisms, viruses, and cell lines. **ATCC** also sells biological research

material to research institutes and commercial manufacturers throughout the United States and in forty-five countries.

In 1994, Marshall **Coleman** and approximately 1,800 veterans of the Persian Gulf War sued ATCC and eighty-two other defendants alleging that the defendants sold material, equipment, and technology to Iraq that was used to create biological and chemical weapons. They brought a class action in Brazoria County for products liability and negligence, contending they were harmed by exposure to those pathogens.

The defendants removed the case to federal court, which dismissed for lack of subject-matter jurisdiction. *Coleman v. Alcolac,* 888 F.Supp. 1388, 1404 (S.D.Tex.1995) (order granting motion to dismiss for lack of subject-matter jurisdiction and remanding cause to state court). Upon remand, **ATCC** filed a special appearance under Texas Rule of Civil Procedure 120a, challenging personal jurisdiction. The trial court heard arguments relating to the motion in 1995 and denied **ATCC's** special appearance three years later.

The court of appeals affirmed, holding that jurisdiction was proper because **ATCC's** Texas sales were "numerous and repetitive." 26 S.W.3d at 49. The court noted that while **ATCC's** Texas sales represented "only about 3.5 percent of its worldwide business," **ATCC** had not directed the court to evidence comparing its Texas sales volume to its sales volume in the forty-five other countries in which it sold products. *Id.* at 46. The court stated:

> Such a comparison ... would have gone to whether **ATCC** could reasonably have anticipated being sued in Texas. Moreover, if Texas

> was **ATCC's** sixth biggest U.S. sales market despite generating only five percent of all **ATCC's** U.S. business, the trial judge could have reasonably inferred most jurisdictions, foreign or otherwise, generated a very low percentage of **ATCC's** overall business. Therefore, the trial judge could also have reasonably inferred the 3.5-percent figure was not insignificant.

Id. The court also observed that **ATCC** did not present comparative-sales evidence regarding its Maryland site which served as a patent-repository for Texas residents. *Id.* at 47. The court found it significant that "**ATCC** [did] not state . . . whether 2.7 percent [of its repository business over a twenty-year period] was a high or low figure compared to its repository business in other states or countries." *Id.*

ATCC petitioned for rehearing *en banc,* which the court of appeals denied. *Id.* at 53. Although the judgment of the court of appeals is normally conclusive for interlocutory appeals, we may exercise jurisdiction if the justices of the court of appeals disagree on a question of law material to the decision. Tex. Gov't Code § 22.225(b)(4), (c). Justice O'Connor, who did not sit on the original panel deciding the case, dissented from the denial of the petition for *en banc* rehearing. 26 S.W.3d at 53. We granted **ATCC's** petition for review to consider whether the trial court erred in denying **ATCC's** special appearance.

II.

We must first determine whether we have subject-matter jurisdiction over this interlocutory appeal. **ATCC** alleges that we have jurisdiction under Texas Government

Code sections 22.001(a)(1) and 22.225(c). Specifically, **ATCC** contends this Court has jurisdiction because Justice O'Connor dissented from the denial of *en banc* review. The question is whether, in this case, "the justices of the court[ ] of appeals disagree[d] on a question of law material to the decision." Tex. Gov't Code §§ 22.001(a)(1), 22.225(c).

In dissenting to the court of appeals' denial of *en banc* review, Justice O'Connor challenged concepts fundamental to the court of appeals' holding. She criticized the panel for creating the concept of "comparative personal jurisdiction." 26 S.W.3d at 53. Disagreeing with the court's jurisdictional analysis pertaining to sales in other states, Justice O'Connor wrote that "[e]vidence showing sales were low in other states, as compared to sales in Texas, should not be a factor to be considered in special appearance cases." *Id.* at 53-54. In her view, the facts upon which the panel found personal jurisdiction were "extremely weak." *Id.* at 53.

Because Justice O'Connor's dissent addressed the merits of the panel's decision and disagreed expressly with a question of law material to the decision, we have jurisdiction to decide this case. Our jurisdiction is based not on the bare fact that a justice dissented from *en banc* review, but on the direct clash between the justice and the court on the appropriate analysis for the case. Having determined that we have jurisdiction to decide this case, we now turn to the issue before us – whether a Texas court may exercise personal jurisdiction over **ATCC** consistent with due process requirements in this case.

III.

Whether a court has personal jurisdiction over a defendant is a question of law. *BMC Software v. Marchand,* 83 S.W.3d 789 (Tex.2002). But in resolving this question of law, a trial court must frequently resolve questions of fact. *Id.* at 794. On appeal, the trial court's determination to grant or deny a special appearance is subject to *de novo* review, but appellate courts may be called upon to review the trial court's resolution of a factual dispute. *Id.* at 794. When the trial court does not issue findings of fact, reviewing courts should presume that the trial court resolved all factual disputes in favor of its judgment. *Id.* at 795. Here, the relevant facts are generally not disputed.

Texas courts may assert personal jurisdiction over a nonresident defendant only if the Texas long-arm statute authorizes jurisdiction and the exercise of jurisdiction is consistent with federal and state due process standards. *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.,* 815 S.W.2d 223, 226 (Tex.1991). The Texas long-arm statute reaches "as far as the federal constitutional requirements of due process will allow." *Id.* Thus, the Texas long-arm statute requirements are satisfied if exercising jurisdiction comports with federal due process limitations. *Id.* We rely on precedent from the United States Supreme Court as well as our own state's decisions in determining whether a nonresident defendant has met its burden to negate all bases of jurisdiction. *BMC Software,* 83 S.W.3d at 795.

Under the Due Process Clause of the Fourteenth Amendment, jurisdiction is proper if a nonresident defendant established "minimum contacts" with Texas and

maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1940). The purpose of the minimum-contacts analysis is to protect the defendant from being haled into court when its relationship with Texas is too attenuated to support jurisdiction. *Schlobohm v. Schapiro,* 784 S.W.2d 355, 357 (Tex.1990). Accordingly, we focus upon the defendant's activities and expectations in deciding whether it is proper to call it before a Texas court. *Id.*

The minimum-contacts analysis requires that a defendant "purposefully avail" itself of the privilege of conducting activities within Texas, thus invoking the benefits and protections of our laws. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). A defendant is not subject to jurisdiction here if its Texas contacts are random, fortuitous, or attenuated. *See Guardian,* 815 S.W.2d at 226. Nor can a defendant be haled into a Texas court for the unilateral acts of a third party. *Id.* It is the quality and nature of the defendant's contacts, rather than their number, that is important to the minimum-contacts analysis. *Id.* at 230 n. 11.

A defendant's contacts with a forum can give rise to either specific or general jurisdiction. For a court to exercise specific jurisdiction over a nonresident defendant, two requirements must be met: (1) the defendant's contacts with the forum must be purposeful, and (2) the cause

of action must arise from or relate to those contacts. *Id.* at 227. General jurisdiction, which the plaintiffs assert here, on the other hand, allows a forum to exercise jurisdiction over a defendant even if the cause of action did not arise from or relate to a defendant's contacts with the forum. *Id.* at 228. General jurisdiction is present when a defendant's contacts with a forum are "continuous and systematic," a more demanding minimum-contacts analysis than specific jurisdiction. *Id.*

The plaintiff bears the initial burden of pleading allegations sufficient to bring a nonresident defendant within the provisions of the long-arm statute. *McKanna v. Edgar,* 388 S.W.2d 927, 930 (Tex.1965). But upon filing a special appearance, the nonresident defendant assumes the burden to negate all the bases of personal jurisdiction alleged by the plaintiff. *Kawasaki Steel Corp. v. Middleton,* 699 S.W.2d 199, 203 (Tex.1985). Because **Coleman** alleges that general personal jurisdiction exists, we examine whether **ATCC** met its burden of establishing that its contacts with Texas were not continuous and systematic. The pertinent jurisdictional facts are set out below.

IV.

ATCC is organized under District of Columbia laws and its principal place of business is Rockville, Maryland. **ATCC** advertises in national and international journals and its catalogues are sent only upon request. The majority of its sales are made by phone or written orders received in Maryland and are sent free-on-board ("F.O.B.") Rockville, Maryland. Title to the goods passes to buyers in Maryland. *CSR Ltd. v. Link,* 925 S.W.2d 591, 594 (Tex.1996); *see also* 10 WILLISTON ON CONTRACTS,

§ 1079A, at 94 n. 6 (3d ed. 1967) (Free on Board "means that title to property passes from the seller to buyer at the designated FOB point."). **ATCC** invoices all of its sales and receives all payments in Maryland.

ATCC is not authorized to do business in Texas and does not have offices, distributors, employees, real property, or telephone listings in Texas. **ATCC** is not required to and does not have a registered agent in Texas. It does not make unsolicited mailings to Texas customers, it does not recruit employees in Texas, and it does not advertise in Texas journals. Nevertheless, the record reveals that **ATCC** has had contacts with Texas. We examine these contacts to determine whether they are "continuous and systematic."

V.

ATCC has sold its products to Texas residents for at least eighteen years. At the commencement of this suit, **ATCC's** Texas sales accounted for 3.5 percent of its total annual sales and five percent of its total U.S. sales, generating approximately $350,000 in revenue. Although **Coleman** argues to the contrary, the record establishes **ATCC's** contention that the sales were shipped F.O.B. from Rockville, Maryland.

In addition to selling goods to Texas residents, **ATCC** also serves as a repository for Texas researchers seeking microorganism patents. For the fifteen to twenty-year period before this suit, nearly 2.7 percent of the 13,000 patents in **ATCC's** Maryland repository came from Texas residents. In connection with these services, interested customers shipped their materials to Maryland and entered into customer safe-deposit agreements. All the

services related to the safe-deposit agreements were performed by **ATCC** in Maryland.

Similarly, in 1991, **ATCC** contracted with the University of Texas Southwestern Medical Center to propagate and test cell-lines. The contract was signed by **ATCC** in Maryland. And like its other agreements with Texas residents, **ATCC** performed all the services related to the contract in Maryland.

Over a five-year period, **ATCC** purchased approximately $378,000 of supplies from thirty-three Texas vendors. Some of the goods were sent F.O.B. from Texas. And from 1987 to 1994, **ATCC** representatives attended five scientific conferences in Texas. At four conferences, **ATCC** had an exhibit booth and distributed corporate publications.

VI.

The court of appeals stated that **ATCC's** volume of Texas sales was the "bedrock" fact that supported jurisdiction. 26 S.W.3d at 53. We disagree. In *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir.1987), the Fifth Circuit discounted the fact that Beech Aircraft sold over $72 million of airframe assemblies to a Texas company because the goods were delivered "F.O.B. Wichita." The court stated:

> [ ] Beech exercised its right to structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states such as Texas, carefully requiring the negotiation, completion, and performance of all contracts in Kansas. Beech has not afforded itself the benefits and protections of the laws of Texas, but

> instead has calculatedly avoided them. . . . We are not aware that other courts have disregarded the structure of transactions in support of general jurisdiction. And, we have held such 'technicalities' relevant in analyzing general personal jurisdiction questions.

Id. at 375-76. We are persuaded by this analysis. General jurisdiction is premised on the notion of consent. That is, by invoking the benefits and protections of a forum's laws, a nonresident defendant consents to being sued there. When a nonresident defendant purposefully structures transactions to avoid the benefits and protections of a forum's laws, the legal fiction of consent no longer applies. Thus, title passing outside of Texas is a factor that weighs against a finding that Texas has general jurisdiction over a nonresident defendant such as **ATCC**. As a result, **ATCC's** Texas sales cannot properly be characterized as a "bedrock" fact that supports jurisdiction.

ATCC contends that its purchases from Texas vendors "do not provide evidence warranting the exercise of general jurisdiction over **ATCC**." We agree. In *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 418, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), the United States Supreme Court stated that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." And the Fifth Circuit has stated, "purchases and trips related thereto, even if they occur regularly, are not, standing alone, a sufficient basis for the assertion of jurisdiction." *Dalton v. R & W Marine, Inc.,* 897 F.2d 1359, 1362 n. 3 (5th Cir.1990). Accordingly,

ATCC's purchases from Texas vendors will not alone support the exercise of general jurisdiction.

Moreover, because **ATCC** signed and performed in Maryland its repository contracts and its contract with the University of Texas Southwestern Medical Center, those contracts do not support a finding of general jurisdiction. *Cf. U-Anchor Adver., Inc. v. Burt,* 553 S.W.2d 760, 763 (Tex.1977) ("[The defendant's] contacts with Texas were not grounded on any expectation or necessity of invoking the benefits and protections of Texas law, nor were they designed to result in profit from a business transaction undertaken in Texas. The contract was solicited, negotiated, and consummated in Oklahoma, and [the defendant] did nothing to indicate or to support an inference of any purpose to exercise the privilege of doing business in Texas."). Similarly, **ATCC's** attendance at the five Texas conferences does not support the exercise of general jurisdiction. The record reflects that the scientific community, not **ATCC**, selected the conference locations. *See National Indus. Sand Ass'n v. Gibson,* 897 S.W.2d 769, 774 (Tex.1995) (no general jurisdiction where nonresident association sent an association representative to a national conference in Texas).

However, for general jurisdictional purposes, we do not view each contact in isolation. All contacts must be carefully investigated, compiled, sorted, and analyzed for proof of a pattern of continuing and systematic activity. *Schlobohm v. Schapiro,* 784 S.W.2d 355, 359 (Tex.1990). Thus, we must determine whether **ATCC's** contacts establish a pattern of continuing and systematic activity.

Two United States Supreme Court decisions discussing general jurisdiction are *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), and *Helicopteros.* In *Perkins,* the president and general manager of a Philippine mining corporation kept his office and company files in Ohio during the Japanese occupation of the Philippine Islands. 342 U.S. at 448, 72 S.Ct. 413. The president conducted the corporation's activities from Ohio. He held directors' meetings in Ohio, deposited corporate funds in two Ohio bank accounts, carried on corporate correspondence from his Ohio office, engaged an Ohio office to act as the corporation's transfer agent, and supervised the rehabilitation of the corporation's Philippine properties from Ohio. *Id.* The foreign corporation, through its president, "ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business." *Id.* at 438, 72 S.Ct. 413. Under these facts, the Supreme Court concluded that the exercise of general jurisdiction by an Ohio court was reasonable. *Id.*

The Court in *Helicopteros,* analyzing facts somewhat similar to those presented here, concluded there was no basis for the assertion of personal jurisdiction. In that case, Helicol, a helicopter company from Colombia, contracted to provide helicopter services in Peru. 466 U.S. at 410, 104 S.Ct. 1868. Four United States citizens were killed in a helicopter crash in Peru. *Id.* Their representatives filed suit against Helicol in Texas. *Id.* at 412, 104 S.Ct. 1868. Helicol filed a motion to dismiss for lack of personal jurisdiction. *Id.* The motion was denied and ultimately the Supreme Court granted *certiorari* to determine whether a Texas court could lawfully exercise general jurisdiction over Helicol. *Id.*

The Court found Helicol's contacts with Texas insufficient to support the exercise of general jurisdiction, even though Helicol had ventured to Texas and negotiated a contract for transportation in Texas, purchased approximately eighty percent of its helicopter fleet (worth over $4 million) and other related equipment from Texas vendors at regular intervals, and had sent pilots and other personnel to Texas for training. *Id.* at 411, 104 S.Ct. 1868. The Court concluded that these contacts did not constitute the kind of "continuous and systematic general business contacts the Court found to exist in *Perkins.*" *Id.* at 416, 104 S.Ct. 1868.

The facts before us are more closely aligned with *Helicopteros* than *Perkins.* Although the quantity of **ATCC's** contacts may suggest that **ATCC** had a significant relationship with Texas, we are not concerned with the quantity of contacts. Instead, we must look to the quality of those contacts. And in this case, we are not persuaded that the quality of **ATCC's** contacts support general jurisdiction as defined by the United States Supreme Court. **ATCC** does not advertise in Texas, has no physical presence in Texas, performs all its business services outside Texas, and carefully constructs its contracts to ensure it does not benefit from Texas laws. *See CSR Ltd.,* 925 S.W.2d at 595 (nonresident defendant did not have continuous and systematic contacts with Texas where the defendant: had no offices, employees, or bank accounts in Texas; had not solicited business in Texas; never owned property and never paid taxes in Texas; and never entered into a contract in Texas). Under these circumstances, we must conclude that **ATCC's** contacts with Texas were not continuous and systematic.

The court of appeals stated that adopting **ATCC's** position would "result in virtually a per se rule preventing

general personal jurisdiction over mail-order companies in any state but where they are headquartered." 26 S.W.3d 37, 52. We are not announcing a new per se rule. What constitutes continuous and systematic contacts can only be determined on a case-by-case basis. The United States Supreme Court has provided the guidelines for such evaluations, which we have applied in reaching our conclusion. If the particular facts demonstrate that a mail-order company's contacts with Texas are not continuous and systematic, the exercise of personal jurisdiction is constitutionally prohibited.

In making this determination, a trial court is bound by the facts and evidence before it. Rather than the quantity of contacts with Texas as compared to other jurisdictions, we look to the nature and quality of those contacts. Thus, "[w]hether a defendant is involved in commerce in another state to a greater or lesser extent than in Texas should have no bearing on whether that defendant has subjected itself to the jurisdiction of Texas courts." *Id.* at 54 (Justice O'Connor dissenting).

VII.

In sum, because **ATCC** did not have sufficient minimum contacts with Texas, it is not subject to *in personam* jurisdiction. Accordingly, we reverse the court of appeals' judgment and render judgment dismissing the case against **ATCC** for lack of personal jurisdiction.

Justice RODRIGUEZ did not participate in the decision.

APPENDIX B

26 S.W.3d 37

Court of Appeals of Texas,
Houston (1st Dist.).

AMERICAN TYPE CULTURE COLLECTION, INC., Appellant,

v.

Marshall COLEMAN, et al., Appellees.*

No. 01-99-00045-CV.

May 18, 2000.
Opinion Overruling Rehearing Aug. 31, 2000.

Randy E. Moore, Lake Jackson, Gordon R. Pate, Joe Michael Dodson, Beaumont, Kathy D. Patrick, Jennifer Horan Greer, Andrew L. Pickens, John Albert Basinger, Houston, for appellant.

Francis I. Spagnoletti, James T. Liston, Houston, for appellee.

Panel consists of Justices COHEN, NUCHIA, and DUGGAN.[1]

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* complete list of all appellees appears in appendices A and B of appellant's brief.

[1] The Honorable Lee Duggan, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

OPINION

MURRY B. COHEN, Justice.

American Type Culture Collection, Inc. (**"ATCC"**) takes this interlocutory appeal from an order denying its special appearance. *See* tex. Civ. Prac. & Rem.Code Ann. § 51.014(a)(7) (Vernon Supp.2000). We consider whether a mail-order company that does not advertise locally in, has no physical presence in, and performs all services outside Texas may nonetheless be subject to general personal jurisdiction in Texas when, among other things, Texas is its sixth largest market in the United States. Concluding it can under the evidence presented, we affirm.

I. Factual and Procedural Background

Appellees are veterans of the 1991 Persian Gulf War and some of their family members. Of the nearly 1800 plaintiffs in this case, about 185 live in Texas. Appellees allege **ATCC**, one of over 80 defendants, sold Iraq dangerous pathogens that were later used in weapons against the appellees who served in that war.

In June 1994, appellees sued the defendants in Brazoria County, Texas on theories of negligence and product liability. **ATCC** made a special appearance. The defendants removed the case to federal court, where **ATCC** moved to dismiss for lack of personal jurisdiction, but Judge Kent dismissed the entire case for lack of subject-matter jurisdiction. *Coleman v. Alcolac et al.*, 888 F.Supp. 1388, 1404 (S.D.Tex. 1995) (order granting motion to dismiss for lack of subject-matter jurisdiction and remanding cause to state court).

On remand, **ATCC** again urged its special appearance. In December 1998, the trial judge denied **ATCC's** special appearance without filing fact findings or legal conclusions. **ATCC** appeals, arguing in four points of error that the trial judge erred.

II. Standard of Review and Burden of Proof

The burden of proof was on **ATCC** to negate all possible grounds for personal jurisdiction. *Garner v. Furmanite Australia Pty., Ltd.*, 966 S.W.2d 798, 802 (Tex.App. – Houston [1st Dist.] 1998, pet. denied). Existence of personal jurisdiction is a question of law, but that determination must sometimes be preceded by the resolution of underlying factual disputes. *James v. Illinois Cent. R.R. Co.*, 965 S.W.2d 594, 596 (Tex.App. – Houston [1st Dist.] 1998, no pet.). When, as here, the trial judge files no fact findings, we presume all factual disputes were resolved to support the judge's order. *Garner*, 966 S.W.2d at 802. While we generally review for factual sufficiency, we review de novo if the underlying facts are undisputed or otherwise established. *C-Loc Retention Sys., Inc. v. Hendrix*, 993 S.W.2d 473, 476 (Tex.App. – Houston [14th Dist.] 1999, no pet.). Many of the facts here are undisputed, although the parties place greatly different significance on them.

III. Jurisdictional Test

A court may assert personal jurisdiction over a nonresident defendant only if the requirements of both the

Fourteenth Amendment's due process clause[2] and the Texas long-arm statute[3] are satisfied. *CSR, Ltd. v. Link,* 925 S.W.2d 591, 594 (Tex.1996) (orig.proceeding). Because the Texas long-arm statute reaches "as far as the federal constitutional requirements of due process will allow," the statute is satisfied if the exercise of personal jurisdiction comports with federal due process. *Id.*

Federal due process requirements are two-fold. First, the nonresident defendant must have purposefully established such minimum contacts with the forum that it could reasonably anticipate being sued there. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). If the nonresident defendant has purposefully availed itself of the privileges and benefits of conducting business in a state, it has sufficient contacts to confer personal jurisdiction. *Id.* Random, fortuitous, or attenuated contacts do not suffice. *Id.* Neither do unilateral actions by third parties claiming some relationship with the nonresident defendant. *Id.* It is the quality and nature of the contacts, rather than their number, that is important. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.,* 815 S.W.2d 223, 230 n. 11 (Tex.1991).

Minimum contacts analysis is further divided into general and specific personal jurisdiction. *CSR, Ltd.,* 925 S.W.2d at 595. The parties agree this is a case of general

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[2] u.S. Const. amend. XIV, § 1.

[3] tex. Civ. Prac. & Rem.Code Ann. § 17.042 (Vernon 1997).

personal jurisdiction,[4] which requires **ATCC** to show its contacts in Texas were not continuous and systematic. *Id.* To support a finding of general jurisdiction, the defendant's forum activities must have been "substantial," which requires stronger evidence of contacts than for specific personal jurisdiction.[5] *Id.*

Second, if the nonresident defendant has purposefully established minimum contacts with the forum, the exercise of jurisdiction must comport with fair play and substantial justice. *Burger King Corp.,* 471 U.S. at 477, 105 S.Ct. 2174, 2184; *Guardian Royal,* 815 S.W.2d at 231.

IV. Jurisdictional Facts

The following evidence was adduced at the special appearance hearing.

ATCC is a non-profit corporation, organized under the laws of the District of Columbia, and having its principal place of business in Maryland. **ATCC** serves as a long-term repository and distribution center for living microorganisms, viruses, and cell lines, which it makes available to scientists and researchers around the world. During the 1980s, **ATCC** sold materials to Iraqi governmental enti-

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[4] Because appellees concede no specific personal jurisdiction exists, we need not consider **ATCC's** point of error one, which claims no specific personal jurisdiction exists over it.

[5] Specific personal jurisdiction exists if the defendant's alleged liability arises from or is related to a specific activity conducted within the forum. *CSR, Ltd. v. Link,* 925 S.W.2d 591, 595 (Tex.1996) (orig.proceeding).

ties, apparently in compliance with then-existing regulations.

ATCC is not authorized by Texas to do business in Texas and has no registered agent for service of process in Texas. It does not have an office or other facilities, any real property, a bank account or telephone listing, or officers, directors, or employees in Texas. Neither does it recruit employees in Texas, unless Texas residents respond to its national employment advertisements. **ATCC** has no Texas distributors for its biological products. It does not control the research conducted by its customers. The evidence does not show that **ATCC** pays any taxes in Texas, but an **ATCC** representative testified that, if **ATCC** incurs any taxes here, it would be sales taxes for Texas goods **ATCC** buys.

A. ATCC's Advertising and Sales Methods

ATCC sells its biological materials to customers throughout the United States, including Texas, and in 45 countries. It is basically a mail-order company. Accordingly, all service to Texas is by telephone or mail. **ATCC** does not make in-person sales visits anywhere. **ATCC** ships its materials F.O.B. ("free on board"), Rockville, Maryland. **ATCC** sends its bills from Maryland, and its customers send payments to Maryland.

ATCC advertises only in national and international periodicals. **ATCC's** biological research materials are listed in catalogues that are sent to customers or prospective customers only upon request. **ATCC** does not make unsolicited, targeted mailings of its catalogues to prospective Texas customers. **ATCC** maintains local Maryland and toll-free 800 numbers for customer inquiries.

B. ATCC's Sales to Texas Residents

All Texas sales are made by phone or written order received by **ATCC** in Maryland. **ATCC** has sold its products to Texas residents for at least 18 years. The record contains over 2,500 pages of detailed invoice reports for **ATCC's** Texas customers, dating from 1989 to 1994; many of those companies are repeat customers. **ATCC's** officer conceded that **ATCC's** sales to Texas are not sporadic, but are "repetitive" on a monthly basis. When this lawsuit was filed, Texas sales accounted for about 3.5 percent of **ATCC's** worldwide sales (in the U.S. and 45 countries) and about five percent of its U.S. sales, making Texas **ATCC's** sixth biggest U.S. sales market and generating about $350,000 annually.

C. Other Services to Texas Residents

ATCC also serves as a repository for researchers seeking microorganism patents. Its patent repository is located in Rockville, Maryland, and those using that service ship their materials there. For the 15 to 20-year period before this lawsuit, approximately 2.7 percent of the 13,000 patent deposits in **ATCC's** repository came from Texas customers. In connection with these services, **ATCC** apparently enters into customer safe-deposit agreements. The record contains a few examples of correspondence notifying a Texas customer that its safe-deposit agreements were expiring, explaining how to renew those agreements, and enclosing a renewal contract already signed by **ATCC**.

The above are not **ATCC's** only services. For example, **ATCC** also offers (including to an unspecified number of

Texas residents) "applied science" services, such as freeze-drying of microorganisms, microorganism identification, and the like. **ATCC** also puts on scientific workshops outside Texas. Additionally, **ATCC** issues quarterly newsletters and laboratory manuals upon request. **ATCC** does not state how many Texas residents requested these services.

D. ATCC's Purchases from Texas Vendors

ATCC buys supplies and media from approximately 3,000 vendors worldwide. About 33 of these, or around 1.4 percent, are in Texas. **ATCC** does not state whether the 1.4 percent figure for Texas is high or low compared to its purchases in other states and countries. From 1989 to 1994, **ATCC** purchased supplies worth about $378,000 from its Texas vendors. Some of these supplies were shipped F.O.B. points in Texas.

E. Specific Contracts with Texas Residents

In 1991, **ATCC** contracted with the University of Texas Southwestern Medical Center ("UT-SMC") to propagate and test cell lines at **ATCC's** Maryland facilities. **ATCC** signed the contract, which contained no choice-of-law or choice-of-forum provisions, in Maryland and then sent it to Texas for UT-SMC's signature. **ATCC** performed in Maryland,[6] but it shipped the results to Texas. Total payment was $113,751, later increased to $183,740 by a 1992 amendment, which **ATCC** signed in Maryland and

[6] A small portion may have been subcontracted to a Virginia company.

then sent for UT-SMC's signature. The contract ended in 1992.

ATCC requires prospective customers to consent to some restrictions on the use and distribution of certain materials before delivery. Consent is obtained by the customers' signing **ATCC's** standard "materials transfer agreement" ("MTA"). The MTA also makes the recipient responsible for injuries in connection with the receipt, handling, storage, or use of those particular materials. The record contains a set of MTAs signed by UT-SMC about four months after this lawsuit was filed in 1994. In these MTAs' standard language on recipient responsibilities, someone interlineated the following (in italics):

> It is also understood that although human cells distributed by the **ATCC** have been subjected to stringent tests and observations which indicate the absence of extraneous agents and deleterious properties that *to the extent authorized by the Constitution and laws of the State of Texas, . . .* [UT-SMC] agrees to be responsible for any claims, costs, damages, or expenses. . . .

In 1994, over three months after this lawsuit was filed, the City of Houston's Department of Health and Human Services executed a purchase order, submitted on its own form, requesting $890.52 of materials from **ATCC**.[7] **ATCC** filled this order in Maryland and sent it F.O.B. Maryland, as the City had requested. The City's purchase

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[7] Appellees assert that the City was the seller and ATCC was the buyer, but the purchase order unmistakably shows the opposite.

order form contained a Texas choice-of-law and choice-of-forum clause for any lawsuit connected with the order.

F. Conferences in Texas

Between 1987 and 1994, **ATCC** employees attended five scientific conferences in Texas. The location of each conference had been chosen by the particular scientific society hosting the meeting, not by **ATCC**. At four of the conferences, **ATCC** had an exhibition booth, at which it distributed its literature, publications, brochures, and catalogues. Some of **ATCC's** highest-ranking representatives attended these conferences. One **ATCC** employee used his Texas visit to collect frozen cells from a "scientific collaborator" in a nearby city.

V. Discussion

A. Minimum Contacts and Purposeful Availment

In point of error two, **ATCC** argues Texas courts have no general personal jurisdiction over it because it did not purposefully avail itself of the privileges and benefits of conducting business in Texas on a continuous and systematic basis. In point of error four, **ATCC** argues that assertion of personal jurisdiction violates the federal Constitution's due process guarantees. We treat these points together.

1. Facts not Relevant to Personal Jurisdiction

We begin with the observation that two of the contracts on which appellees rely – the 1994 MTAs with UT-SMC and the 1994 purchase order from the City of Houston – were made after this lawsuit was filed. Federal

authority indicates that contacts occurring after suit is filed are irrelevant because "district courts should examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances – up to and including the date the suit was filed – to assess whether they satisfy the 'continuous and systematic' standard." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569-70 (2nd Cir.1996); *see also Noonan v. Winston Co.*, 135 F.3d 85, 94-95 (1st Cir.1998); *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 n. 1 (5th Cir.1990); *Haas v. A.M. King Indus., Inc.*, 28 F.Supp.2d 644, 648 (D.Utah 1998). Some Texas authority implies that the relevant contacts are those up to the time of the injury. *See Scott v. Huey L. Cheramie, Inc.*, 833 S.W.2d 240, 242 (Tex.App. – Houston [14th Dist.] 1992, no writ); *Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 45 (Tex.App. – Houston [14th Dist.] 1985), *writ ref'd n.r.e.*, 699 S.W.2d 199 (Tex.1985). Whether the cut-off date for determining general jurisdiction is the date of the injury or the date the suit is filed, the result is the same: these two contracts are irrelevant, and we do not consider them in our analysis.

2. Other Contracts with Texas Resident

By itself, UT-SMC's 1991 contract with **ATCC** to propagate and test cell lines does not weigh much in favor of finding personal jurisdiction. First, merely contracting with a Texas resident, without more, does not satisfy the minimum contacts requirement. *See, e.g., Magnolia Gas Co. v. Knight Equip. & Mfg. Corp.*, 994 S.W.2d 684, 691 (Tex.App. – San Antonio 1998, no pet.) (contract dispute; specific personal jurisdiction). Second, the contract's performance of propagating and testing cell lines took place in Maryland, although the results were shipped to

Texas. Third, the contract contained no choice-of-law or choice-of-forum clauses. The first two observations are also true for **ATCC's** patent-repository and safe-deposit agreements with Texas residents.

ATCC has other contacts with Texas, however. **ATCC** also sells biological materials to and buys supplies from Texas residents. It provides "applied science" services and issues quarterly newsletters and laboratory manuals upon request, although it did not demonstrate how many Texas residents request or receive these services. Between 1987 and 1994, **ATCC** employees attended five scientific conferences in Texas and distributed literature, publications, brochures, and catalogues at four of them. Therefore, we will weigh the propagation, patent-repository, and safe-deposit contracts in the context of the jurisdictional facts discussed below.

3. ATCC's Attendance at Five Texas Conferences

Standing alone, **ATCC's** mere attendance at five conferences and trade shows in Texas would not be significant, as the location of each conference was decided entirely by the scientific group hosting the event, not by **ATCC**. *See Clark v. Noyes,* 871 S.W.2d 508, 519 (Tex.App. – Dallas 1994, no writ) (nonresident defendant doctor's attending and speaking at two national conferences in Texas insufficient to confer general personal jurisdiction over him); *see also National Indus. Sand Ass'n v. Gibson,* 897 S.W.2d 769, 774 (Tex.1995) (orig.proceeding) (no general personal jurisdiction, although nonresident association's member attended one national conference in Texas). However, **ATCC** distributed marketing materials at four

of these events. Additionally, as noted above, **ATCC's** attendance at these conferences was not **ATCC's** only Texas contact. Therefore, we will weigh **ATCC's** marketing at these conferences in the context of the jurisdictional facts discussed below.

4. ATCC's National and International Advertising

We conclude **ATCC's** advertising in national and international periodicals and its maintaining a toll-free 800 number do not, by themselves, weigh in favor of finding jurisdiction in Texas. *See Hayes v. Wissel,* 882 S.W.2d 97, 98-99 (Tex.App. – Fort Worth 1994, no writ) (no general or specific personal jurisdiction when, among other things, defendant advertised in international magazine, but not in Texas media); *Bearry v. Beech Aircraft Corp.,* 818 F.2d 370, 376 (5th Cir.1987) (holding nationwide advertising program did not result in general personal jurisdiction in Texas); *cf. C.W. Brown Mach. Shop, Inc. v. Stanley Machinery Corp.*, 670 S.W.2d 791, 792, 793-94 (Tex.App. – Fort Worth 1984, no writ) (no specific personal jurisdiction when, among other things, defendant had no direct mailings to Texas and advertised only in national magazines, but not in Texas media); *Myers v. Emery,* 697 S.W.2d 26, 32 (Tex.App. – Dallas 1985, no writ) (among others, fact that nonresident attorney advertised in *Martindale-Hubbell* did not create personal jurisdiction).

However, we reject any implication by **ATCC** that its being an international mail-order business and sending its catalogues only upon request *necessarily* insulates it from Texas jurisdiction. "Although territorial presence frequently

will enhance a potential defendant's affiliation with the State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King Corp.*, 471 U.S. at 476, 105 S.Ct. at 2184.

5. Jurisdictional Implications of Shipping F.O.B.

We also note that, by shipping its materials F.O.B. Maryland, **ATCC** ensured title passed to the customer outside Texas. *See Computer Synergy Corp. v. Business Sys. Prod., Inc.*, 582 S.W.2d 573, 576 (Tex.Civ.App. – Houston [1st Dist.] 1979, no writ); *Sun-X Int'l Co. v. Witt*, 413 S.W.2d 761, 767 (Tex.Civ.App. – Texarkana 1967, writ ref'd n.r.e.). Title's passing outside Texas can weigh against finding personal jurisdiction in Texas. *See Link*, 925 S.W.2d at 594, 595.[8] The fact that title passes outside Texas is not dispositive, however. *C-Loc Retention*, 993 S.W.2d at 478 (specific personal jurisdiction); *Sun-X Int'l*, 413 S.W.2d at 767-68 (specific personal jurisdiction). Also,

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[8] *See also Computer Synergy Corp. v. Business Sys. Prod., Inc.*, 582 S.W.2d 573, 576 (Tex.Civ.App. – Houston [1st Dist.] 1979, no writ); *Walker v. Newgent*, 583 F.2d 163, 166 (5th Cir.1978); *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525, 536 (S.D.Tex.1994).

we note that invoices for some items **ATCC** bought from its Texas vendors show the items were shipped F.O.B. various *Texas* cities, meaning title passed to **ATCC** in Texas. Other invoices from **ATCC's** Texas purchases do not contain any F.O.B. information, and **ATCC's** brief does not refer to any evidence it produced showing the purchases were intended to be anything other than F.O.B. points in Texas.

Therefore, like the *C-Loc Retention* court, we will weigh delivery method in the context of the jurisdictional facts discussed below. *See id.,* 993 S.W.2d at 478.

6. Application of the Law to the Remaining Jurisdictional Facts

ATCC cites 11 cases to show no general personal jurisdiction exists over it. We distinguish each.

ATCC first relies on *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). This reliance is misplaced. In *Helicopteros,* the defendant ("Helicol"), a Colombian corporation providing helicopters to a joint venture that was constructing a Peruvian pipeline, was sued in Texas after the crash of its helicopter in Peru. *Id.,* 466 U.S. at 409-10, 104 S.Ct. at 1870. The joint venture had hired Helicol for flight services to the pipeline construction area. *Id.,* 466 U.S. at 410, 104 S.Ct. at 1870.

Helicol was not authorized to do business in Texas. Neither did it have an agent for process service, perform services or sell products, solicit business, keep or recruit employees, have shareholders, own real property, have an office, or keep records in Texas. *Id.,* 466 U.S. at 411, 104

S.Ct. at 1870-71. Its contract with the joint venture was executed in Peru, designated Peru as the dispute forum, and called for payments (which happened to be drawn on a Texas bank) to Helicol's New York bank account. *Id.*, 466 U.S. at 410-11, 104 S.Ct. at 1870. Helicol once visited the venture's Houston headquarters for the contract's negotiation. *Id.* Additionally, over seven years, Helicol bought about 80 percent of its helicopter fleet and accessories and spare parts for over $4 million from Bell Helicopter Company in Texas, had Bell train its pilots, and sent its personnel to visit Bell for "plant familiarization" and technical consultation. *Id.*

Nonetheless, the *Helicopteros* Court held Helicol was not subject to general personal jurisdiction in Texas. *Id.*, 466 U.S. at 418-19, 104 S.Ct. at 1874. After concluding the one trip to negotiate the contract was not continuous and systematic, and that Helicol's acceptance of payments drawn on a Texas bank was of negligible significance, the Court held as follows:

> [T]he Court's opinion in *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372 (1923) (Brandeis, J., for a unanimous tribunal) makes clear *that purchases and related trips, standing alone,* are not a sufficient basis for a State's assertion of jurisdiction. . . .
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> * * *
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> [W]e hold that *mere purchases,* even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions. Nor can we conclude that the fact Helicol sent personnel into Texas for training in connection with the

> purchase of helicopters and equipment in that State in any way enhanced the nature of Helicol's contacts with Texas. *The training was a part of the package of goods and services purchased by Helicol from Bell Helicopter.* The brief presence of Helicol employees in Texas for the purpose of attending the training sessions is no more a significant contact than were the trips to New York made by the buyer for the retail store in *Rosenberg.*[9]

Id., 466 U.S. at 417-18, 104 S.Ct. at 1874 (underlined emphasis added).

The *Helicopteros* Court held that *mere purchases* from Texas residents – although numerous, long-term, and involving millions of dollars – did not suffice, *standing alone,* to confer jurisdiction. *Id.* The Court also relied on the fact that Helicol employees' visits to and training in Texas were part of a "package of goods and services," along with Helicol's purchases. *Id.*

In contrast, **ATCC's** sales were separate and discrete transactions, not part of a unified "package of goods and services." More importantly, **ATCC** did not just purchase from Texas residents: it also *sold* items and services to them, frequently and regularly. Although title passed to **ATCC's** Texas customers in Maryland, **ATCC's** Texas sales were numerous and repetitive, making Texas **ATCC's** sixth

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[9] The *Rosenberg* Court held that an Oklahoma corporation was not "present" in New York, for purposes of process service, when the corporation's only connection with New York was its purchasing there "from time to time" a large part of its merchandise and the occasional visits of its officers there to make those purchases. 260 U.S. 516, 518, 43 S.Ct. 170, 171, 67 L.Ed. 372 (1923).

biggest U.S. sales market, despite constituting only about five percent of **ATCC's** U.S. sales. And while **ATCC's** Texas sales represented only about 3.5 percent of its worldwide business, **ATCC** has not directed us to evidence comparing its Texas sales volume to its sales volume in the 45 countries it sold to. For example, did **ATCC's** sales in any of these 45 countries top 3.5 percent of worldwide sales? We cannot know whether the figure for Texas is high or low compared to sales in nations outside the United States. Such a comparison, had **ATCC** made it, would have gone to whether **ATCC** could reasonably have anticipated being sued in Texas. Moreover, if Texas was **ATCC's** sixth biggest U.S. sales market despite generating only five percent of all **ATCC's** U.S. business, the trial judge could have reasonably inferred most jurisdictions, foreign or otherwise, generated a very low percentage of **ATCC's** overall business. Therefore, the trial judge could also have reasonably inferred the 3.5-percent figure was not insignificant. Finally, **ATCC** had sold to Texas customers, many of whom were repeat customers, for at least 18 years and in numbers that its officer admitted were not sporadic; these are not "random, fortuitous, or attenuated contacts." *See Burger King Corp.,* 471 U.S. at 475, 105 S.Ct. at 2184.

ATCC responds that numbers alone cannot confer jurisdiction over it and that its Texas contacts were not of a quality or nature sufficient to confer jurisdiction. *See Guardian Royal,* 815 S.W.2d at 230 n. 11 (holding quality and nature of contacts, rather than their number, is the important focus in minimum contacts analysis). But **ATCC's** sales *were* its business, or at least a major part of it. Therefore, they were significant not only for their number, but for their quality and nature. The fact that

title to the goods **ATCC** sold passed in Maryland does not alter our conclusion.

Against this backdrop, **ATCC's** marketing at four of five conferences in Texas and its propagation, safe-deposit, and patent-repository contracts with Texas residents, although comprising only about 2.7 percent of its repository business over a 20-year period and performed in Maryland, also weigh *slightly* in favor of finding personal jurisdiction. Further, **ATCC** does not state if it showed below whether 2.7 percent was a high or low figure compared to its repository business in other states or countries. Neither does **ATCC** state how many Texans requested or were provided its "applied science" services or newsletters and manuals. It was **ATCC's** burden to demonstrate whether Texas residents partook of these services and, if so, to what extent, to show it could not reasonably anticipate being sued in Texas. *See Garner,* 966 S.W.2d at 802 (defendant's burden to negate all possible grounds).

ATCC also relies on *Reyes v. Marine Drilling Cos.,* which in turn relied on *Helicopteros. Reyes,* 944 S.W.2d 401 (Tex.App. – Houston [14th Dist.] 1997, no writ). *Reyes* is distinguishable. In *Reyes,* a worker sued nonresident Ingalls Shipbuilding, Inc. for injuries he sustained on a rig it had designed. *Id.* at 402. Ingalls did not manufacture anything, have an office, station officers or employees, own or lease real property, market or distribute products, have a registered agent, pay taxes, or maintain bank accounts in Texas. *Id.* Like **ATCC**, it executed and performed its contracts outside Texas. *Id.* Unlike **ATCC**, which does not say if any of its contracts with Texas residents had choice-of-law clauses, Ingalls incorporated a Mississippi choice-of-law clause in all its contracts with Texas residents. *Id.*

Ingalls had purchased over $183,000,000 of goods from at least 471 Texas residents since 1987 and contracted for repairs with one Texas firm. *Id.* at 403. Ingalls had also contracted 303 times as purchaser with a Conroe company and had solicited employees in five Texas periodicals since 1987. *Id.* Since 1990, Ingalls had sold Texas companies about $851,512 in scrap metal – an amount of sales the *Reyes* court considered only "isolated" – which Ingalls delivered in Mississippi. *Id.* at 403. Ingalls had also sent representatives to Texas at least 204 times to inspect potential vendors or to review items it was buying. *Id.* Despite all these contacts, the *Reyes* court held Ingalls had insufficient minimum contacts to establish general personal jurisdiction. *Id.* at 404-05.

Reyes does not control here. The *Reyes* court focused mainly on Ingalls's *purchases* from Texas residents; the court considered Ingalls's Texas sales "isolated" and noted Ingalls did not distribute its products in Texas. *Id.*, 944 S.W.2d at 402, 405. In contrast, **ATCC's** Texas sales were numerous and repetitive and made Texas a significant market for **ATCC**. Additionally, Ingalls's contracts expressly invoked Mississippi law, but **ATCC** did not show that its contracts invoked another state's law. Finally, while the *Reyes* court did not discuss this factor, we note that **ATCC** took title to at least some of its Texas purchases in Texas, by virtue of their being shipped F.O.B. points in Texas. *See Computer Synergy,* 582 S.W.2d at 576.

ATCC further relies on *Dominion Gas Ventures, Inc. v. N.L.S., Inc.,* which we distinguish. 889 F.Supp. 265 (N.D.Tex.1995). The *Dominion Gas* court held that no general personal jurisdiction existed over a defendant in a contract breach suit when (1) the defendant's invoices for well cleaning and servicing work, which it performed for at

least eight different companies in Texas, were only four to seven percent of its gross invoices two years ($70,000 value) and two percent of its gross invoices the next year ($22,359 value); (2) the majority of this work required only one employee and a few hours of labor; and (3) all communications occurred outside Texas or by phone or fax. *Id.* at 267-68. Here, in contrast, the first factor differs: **ATCC's** Texas sales were numerous and repetitive, amounting to $350,000 annually and making Texas **ATCC's** sixth biggest U.S. sales market. The *Dominion Gas* plaintiff (which, unlike appellees, had the burden to show personal jurisdiction in federal court) did not show this.

Bearry v. Beech Aircraft Corp., on which **ATCC** next relies, is also distinguishable. In *Beech*, survivors of those killed in a Beech aircraft in Mississippi sued Beech in Texas on product liability theories. 818 F.2d at 372. Beech had engaged in a nationwide marketing campaign, during which nearly $250 million of its products had flowed to 17 independent Texas dealers. *Id.* Its representatives had occasionally visited Texas at the dealers' request. *Id.* at 373. Beech had also manufactured over $72 million of airframe assemblies for a Texas helicopter company (not a Beech independent dealer), with all products shipped F.O.B. Beech's facilities. *Id.* Additionally, Beech had bought over $195 million of goods and services from over 500 Texas vendors pursuant to contracts negotiated, and under which goods were accepted, outside Texas. *Id.* Nevertheless, the *Beech* court held that Beech did not have the systematic and continuous contacts needed to invoke general personal jurisdiction. *Id.* at 376.

Beech is distinguishable to the extent it was considering (1) whether the independent dealers' activities could be attributed to Beech; (2) whether Beech's relationship with

those dealers could be considered; and (3) whether a "stream of commerce" theory supported jurisdiction. Those issues are not present here. It also differs because **ATCC** sent materials directly to Texas residents, while generally Beech sent its products through independent Texas dealers. A further distinction is that **ATCC** did not show that title to the Texas goods it bought regularly passed to it outside Texas (in fact, the record affirmatively shows that **ATCC** sometimes accepted goods shipped to it F.O.B. points in Texas). Finally, there is no indication in *Beech* whether Beech built its airframe assemblies for the Texas helicopter company under many, separate contracts or under a few, "on-going" contracts. *See id.* at 373; *compare Helicopteros,* 466 U.S. at 417-18, 104 S.Ct. at 1874 (considering that the training nonresident's employees received in Texas was part of a "package of goods and services" under contract with one Texas company). Here, in contrast, there was evidence **ATCC's** Texas sales were numerous, repetitive, discrete transactions involving many Texas buyers; and while **ATCC's** Texas sales were much less than the $72 million in *Beech,* Texas was **ATCC's** sixth biggest U.S. sales market.

We likewise distinguish *Williams v. Wilson,* on which **ATCC** relies. 939 F.Supp. 543 (W.D.Tex.1995), *aff'd without op.,* 95 F.3d 1149 (5th Cir.1996). In *Williams,* a contract-breach case, the district court dismissed New York defendant Penthouse for lack of general personal jurisdiction when Penthouse had "derived monthly revenues from sales of . . . numerous products in Texas" and circulated its magazine to Texas newsstands and direct-mail subscribers, but had no presence there. *Id.* at 549, 551. Penthouse's only Texas contacts were its magazine and product sales. *Id.* at 549. The plaintiff, unlike appellees, had

the burden of proof, and she made no showing how Penthouse's Texas sales compared to those in other jurisdictions. *See id.* Here, the record contains that evidence for U.S. sales, and it shows Texas was a significant U.S. market for **ATCC**.

We distinguish *National Industrial Sand Association v. Gibson,* on which **ATCC** further relies, because the nonresident association's contacts there consisted only of (1) one member company's being a Texas resident, (2) periodic mailings to the entire membership, and (3) an association representative's one-time attendance at a Texas conference. 897 S.W.2d at 774. In contrast, **ATCC's** contacts cannot be reduced to mere membership mailings.

ATCC next relies on *Conner v. ContiCarriers & Terminals, Inc.,* which we also find distinguishable. 944 S.W.2d 405 (Tex.App. – Houston [14th Dist.] 1997, no writ) (plurality op.). Conner, a Louisiana resident, was injured in a boat collision on Mississippi waters. *Id.* at 409. Conner was an employee of the boat's operator, ContiCarriers. *Id.* ContiCarriers was authorized to do business in, had a designated agent for service in, and filed franchise taxes in Texas, but had no assets, headquarters, accounts, or advertisements there; it had one Texas employee; it was once sued in Texas; of its 500 to 600 barges operated annually, only 10 to 12 "ended up" in Texas at customers' request, because Texas was never the original destination of its barges; its barge business in Texas generated less than one fourth of one percent of ContiCarriers's total revenue over two years; and ContiCarriers often refused requests to take barges to Texas because it did not "do business" there and had nothing to haul back. *Id.* at 417-18. Conner and his wife sued ContiCarriers, its parent, and the operator of the other vessel in Texas for Conner's

personal injuries. *Id.* at 409. The trial judge granted ContiCarriers's special appearance, and the court of appeals affirmed. *Id.* at 409, 420.

This is simply not a case like *Conner.* Unlike ContiCarriers, **ATCC** sold to Texas residents and shipped its materials directly to them upon request, albeit F.O.B. Maryland; that is, its products' destination was Texas. **ATCC** did not avoid Texas – or any other state or country for that matter – as did ContiCarriers: **ATCC's** annual Texas sales were numerous, repetitive, and made Texas **ATCC's** sixth biggest U.S. sales market, despite representing only five percent of all U.S. business. Moreover, as noted above, although **ATCC's** Texas sales were only 3.5 percent of its worldwide business, **ATCC** did not show whether this was a high or low figure compared to its sales in the 45 countries to which it sold materials. In contrast, ContiCarriers showed its Texas revenue was low compared to that generated in other states. *Id.* at 417.

Next, **ATCC** relies on *Siemer v. Learjet Acquisition Corp.*, which we find does not control. 966 F.2d 179 (5th Cir.1992). The *Siemer* plaintiffs sued Learjet for the wrongful death of those killed aboard its aircraft that crashed overseas. *Id.* at 180. The plaintiffs and decedents were residents of Greece; the aircraft was operated by a Greek company and permanently based and serviced there; it was not designed or manufactured in Texas, ever repaired or serviced there, or ever owned by a Texan; Learjet was a Delaware corporation whose only physical presence in Texas was a designated corporate agent; all Learjet's sales were made from products warehoused outside Texas; only about one percent of Learjet's sales were to Texas residents; Learjet advertised in national journals distributed in Texas; and Learjet occasionally

mailed information to prospective customers in Texas. *Id.* at 180-81. The trial judge dismissed the claims against Learjet for lack of general personal jurisdiction, and the Fifth Circuit court of appeals affirmed. *Id.* at 180, 184.

Only about one percent of Learjet's sales were to Texas residents. *Id.* at 181. While there was no indication how this percentage compared to Learjet's sales in other countries, we note that the *plaintiff* in federal court has the burden to show personal jurisdiction. *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 592 (5th Cir. 1999). Therefore, the plaintiffs in *Siemer* had the burden of showing Learjet could reasonably have anticipated being sued in Texas. One way of doing this would have been to show the one percent of sales to Texas residents was high, compared to that in other jurisdictions. The *Siemer* plaintiffs evidently did not or could not do so. In Texas, conversely, the *defendant* has the burden of negating all possible grounds of personal jurisdiction. *Garner,* 966 S.W.2d at 802. Therefore, it was ***ATCC's*** burden to show it could not reasonably have anticipated being sued in Texas. One way to have done this would have been for **ATCC** to show its Texas sales were minimal or relatively low compared to its sales in other jurisdictions. Instead, the evidence showed **ATCC's** annual Texas sales were numerous, repetitive, and made Texas **ATCC's** sixth biggest U.S. sales market. And while **ATCC's** Texas sales were only 3.5 percent of its overall business, **ATCC** did not demonstrate whether this figure was high or low compared to that in the 45 countries to which it made sales.

We also distinguish *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, a contract-breach suit **ATCC** cites. 700 F.2d 1026 (5th Cir. 1983). No personal jurisdiction existed there because the goods the plaintiff Texas corporation

made were shipped outside Texas, where all the defendant corporation's work took place; the defendant corporation's sole Texas contact was this one contract; the Texas corporation's agent initiated the deal; and the contract incorporated Alaska law. *Id.* at 1029-31.

Finally, we distinguish two more Texas cases on which **ATCC** relies. In *Billingsley Parts and Equipment, Inc. v. Vose,* we held that no general jurisdiction existed because the defendant's only Texas contacts related to the one contract under litigation. 881 S.W.2d 165, 169 (Tex.App. – Houston [1st Dist.] 1994, writ denied). Here, in contrast, **ATCC's** sales and contracts were separate, discrete, and "repetitive." In *U-Anchor Advertising, Inc. v. Burt,* among other differences with the case at hand, the defendant was a "passive customer of a Texas corporation who neither sought, initiated, nor profited from his single and fortuitous contact with Texas." 553 S.W.2d 760, 763 (Tex.1977).

7. Resolution

We hold the trial judge did not err in determining **ATCC** purposefully established minimum contacts with Texas on a continuous and systematic basis and that Texas thus has general personal jurisdiction over **ATCC**.

We overrule **ATCC's** point of error two and the corresponding part of point of error four.

B. Fair Play and Substantial Justice

In point of error three, **ATCC** argues that traditional notions of fair play and substantial justice do not permit the exercise of general personal jurisdiction over it. In point of error four, **ATCC** argues that assertion of personal

jurisdiction violates the federal Constitution's due process guarantees. We treat these points together.

The exercise of jurisdiction over **ATCC** must comport with fair play and substantial justice. *Burger King Corp.*, 471 U.S. at 477, 105 S.Ct. at 2184; *Guardian Royal*, 815 S.W.2d at 231. We may consider factors such as (1) the burden on **ATCC**, (2) Texas's interest in adjudicating the dispute, (3) appellees' interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental, substantive social policies. *Burger King Corp.*, 471 U.S. at 477, 105 S.Ct. at 2184; *Guardian Royal*, 815 S.W.2d at 231. Only in rare cases, however, will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state. *Guardian Royal*, 815 S.W.2d at 231. The burden was on **ATCC** to present "a compelling case that the presence of some consideration would render jurisdiction unreasonable." *Id.*

1. The Burden on ATCC

In addition to the fact that **ATCC** has no physical presence in Texas, **ATCC** relies on its officer's affidavit that, "It would be burdensome, inconvenient, and expensive for **ATCC** to be forced to come to Brazoria County, Texas, to defend this suit." This statement is conclusory. **ATCC's** brief does not rely on any other record evidence of, for example, how many nonresident witnesses are necessary, the extent of their hardship or ability to testify in Texas, or any one's refusal to testify here voluntarily. *See*

E.I. DuPont De Nemours & Co. v. Bailey, 986 S.W.2d 82, 84 (Tex.App. – Beaumont 1999, pet. dism'd w.o.j.) (concluding defendant did not demonstrate it would be excessively burdened by defending suit in Texas when defendant did not introduce evidence of these and like matters). We note, too, that **ATCC** had no difficulty in doing enough business in Texas to make Texas its sixth biggest U.S. market, albeit by mail and phone, and that its high officers found it convenient to attend conferences here.

2. Texas's Interest in the Dispute

ATCC argues that (1) Texas's interest in this dispute is slight because only about 10 percent of appellees are Texas residents and, in any event, (2) Texas's interest in ensuring the quality and safety of **ATCC's** materials sold to Texans is not implicated in a case concerning shipments to Iraq. As for the first argument, Texas has an interest because 185 of its residents are involved. This is more than 10 percent of all appellees. No other state is said to be home to more. Moreover, only a small percentage of appellees would likely be the residents of *any* one state. For that reason, the trial judge could have reasonably concluded that Texas has as great an interest in this dispute as does any other state, including Maryland. The same may be said for the second argument: if it is meritorious, then *no* state would have an interest in adjudicating a dispute over materials sold to Iraq and allegedly used against U.S. military personnel there.

We distinguish *James v. Illinois Central Railroad Co.,* on which **ATCC** relies. 965 S.W.2d 594. There, neither the plaintiff, who sued the railroad for injuries he sustained as a switchman in his home state of Tennessee, nor the

railroad were residents of Texas. *Id.* at 596, 599. Here, more than 10 percent of appellees are Texas residents. And, while we did not expressly base *James*'s holding that "Texas, by subjecting Illinois Central to its court system, would not be protecting its citizens from the potential future actions of Illinois Central" on this, we note that Tennessee clearly *would* have had a such an interest, because the accident there happened to one of its own residents. *Id.* at 599. Here, in contrast, *no* state's interest is shown to be greater than any other's in the alleged use of pathogens against these plaintiffs in an overseas war.

Accordingly, this factor weighs in favor of Texas jurisdiction or, at the very least, it does not favor any state over Texas.

3. Appellees' Interest in Convenient and Effective Relief

4. The Interstate Judicial System's Interest in Effective Resolution of this Controversy

ATCC claims the lengthy procedural history of this case shows appellees' interest in obtaining convenient and effective relief is not served by allowing suit here. In support, **ATCC** argues (1) it "has spent nearly five years trying to extricate itself from this case," (2) 20 other defendants have special appearances pending, and (3) appellees have not yet been certified as a class. None of these items makes Texas less convenient or effective for appellees: the first is due to **ATCC's** efforts, not appellees'; the second would be as likely to occur in any state, given that 83 defendants and 1799 plaintiffs from 49 states are involved; and the last is irrelevant. Appellees would not have selected Texas as their forum had they considered it

inconvenient or ineffective for them. *See DuPont,* 986 S.W.2d at 85 (even when majority of plaintiffs were non-residents, holding, "The plaintiffs chose Texas as their forum; therefore, we can presume they do not find it inconvenient or ineffective."); *Solow v. Century Assets Corp.*, 12 S.W.3d 512, 517 (Tex.App. – Beaumont 1999, no pet.) (same). **ATCC** does not argue separately how the interstate judicial system's interest in the effective resolution of this controversy weighs against subjecting **ATCC** to suit in Texas.

Accordingly, these factors weigh in favor of Texas jurisdiction.

5. The Shared Interest of the Several States in Furthering Fundamental, Substantive Social Policies

ATCC argues that, as a matter of social policy, it is contrary to Texas's interest to exercise jurisdiction over it, because doing so would deter **ATCC**, which is a non-profit research organization, from making its services and materials available in Texas. This argument could be true for any state except Maryland, which is **ATCC's** principal place of business. In any event, we agree with appellees that Texas has an equal interest with that of all other states in adjudicating the claims of U.S. service personnel – including some of its own residents – allegedly exposed to dangerous pathogens in Iraq.

Accordingly, this factor weighs in favor of Texas jurisdiction or, at least, it does not favor any state over Texas. *See General Refractories Co. v. Martin,* 8 S.W.3d 818, 823-24 (Tex.App. – Beaumont 2000, pet. filed) (holding this factor weighed in favor of Texas jurisdiction when no evidence

showed other states' social policy interest was greater than that of Texas); *DuPont,* 986 S.W.2d at 85 (holding this factor weighed in favor of neither state under same circumstances).

6. Resolution

We hold the trial judge did not err in determining the exercise of jurisdiction over **ATCC** would not offend traditional notions of fair play and substantial justice. We overrule point of error three and the remainder of point of error four.

VI. Conclusion

We affirm the order denying **ATCC's** special appearance.

SUPPLEMENTAL OPINION ON MOTION FOR REHEARING

Appellant, American Type Culture Collection, Inc. (**"ATCC"**), has moved for rehearing. We overrule that motion, but issue this supplemental opinion to address some of its arguments.

Under rehearing issue one, **ATCC** argues that our jurisdictional formula results in jurisdiction over mail-order companies only in populous states, thereby violating the U.S. Constitution's Due Process Clause.

ATCC did not argue this before rehearing, although appellees had relied heavily on the fact that Texas was **ATCC's** sixth largest U.S. market and that **ATCC's** sales were "repetitive" and not sporadic – the same facts on

which our opinion largely relied. We conclude this is not an argument that could have been made only after reading our opinion. Therefore, we will not consider it. *See, e.g., McGuire v. F.D.I.C.*, 561 S.W.2d 213, 216 (Tex.Civ.App. – Houston [1st Dist.] 1977, no writ); *Trice Prod. Co. v. Dutton Drilling Co.*, 333 S.W.2d 607, 617 (Tex.Civ.App. – Houston 1960, writ ref'd n.r.e.).

Moreover, adopting **ATCC's** view would result in virtually a per se rule preventing general personal jurisdiction over mail-order companies in any state but where they are headquartered. We can find no support for such a per se rule.[1]

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[1] Some case law finding general personal jurisdiction over non-resident mail-order companies indicates the opposite. *See Sollinger v. Nasco Int'l, Inc.*, 655 F.Supp. 1385, 1388-89 (D.Vt.1987) (under long-arm statute reaching as far as Texas's, after holding specific personal jurisdiction existed, noting in dicta that there was also general personal jurisdiction when defendant was mail- and phone-order company, sent its catalog to unspecified number of Vermont residents, and had no other Vermont contacts); *see also Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 679-80, 231 S.E.2d 629, 632-33 (1977) (under long-arm statute reaching as far as Texas's, and for claims that did not arise out of defendant's activities in North Carolina, holding personal jurisdiction existed over defendant that "engaged in substantial activity" in North Carolina by regularly mailing advertisements to North Carolina residents, selling $50,000 of coins to 27 residents in 142 sales, and once sending representative to sell to and service North Carolina customer); *Michigan Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir.1989) (under long-arm statute reaching as far as Texas's, holding there was general personal jurisdiction when defendants were mail-order businesses and also solicited sales by mail, they had independent sales representative in Michigan, 3 percent of total sales were in Michigan, they made at least one sale per month, and they had no other contacts with Michigan). *Cf. Tools USA & Equip. Co. v. Champ Frame Straightening Equip. Inc.*, 841 F.Supp. 719, 720-21 (M.D.N.C.1993) (after applying virtually same "continuous and systematic – doing

(Continued on following page)

We overrule this argument under rehearing issue one.

Under rehearing issue two, **ATCC** argues

> The Panel gives only lip service to the concept of purposeful availment, adopting what might best be described as a "pebbles-on-the-scale" theory of personal jurisdiction. It has accumulated a number of pebble-like facts (*e.g.*, **ATCC's** attending five conferences in Texas, making 1.7% of sales to Texas residents, etc.) that it concedes would be insufficient to justify general jurisdiction by themselves and has declared that the sum of these pebbles is, in essence, greater than their constitutive parts.

We disagree. We placed some "pebbles" on the jurisdictional scale, but only on top of the "bedrock" facts that (1) Texas was **ATCC's** sixth biggest U.S. market; (2) its sales were continuous and regular, not sporadic; and (3) these sales had continued for at least 18 years. That is, minimal contacts, such as **ATCC's** attending Texas conferences and not showing its contracts included non-Texas-choice-of-law clauses, and signing 2.7 percent of its repository agreements with Texas residents, would not have tipped the jurisdictional scale had Texas not already been an important sales market for **ATCC**.

---

business" test as that used to determine general personal jurisdiction, holding venue proper against defendant in North Carolina district in which 1 to 1.5 percent of defendant's national mail-order business, and 2.5 to 3 percent of its publication circulation, took place).

We overrule this argument under rehearing issue two.

We overrule **ATCC's** rehearing motion.

The panel denied appellant's motion for rehearing.

A majority of the Justices of the Court voted to deny appellant's motion for en-banc rehearing.

Justice O'CONNOR dissents from the denial of appellant's motion for en-banc rehearing.

MICHOL O'CONNOR, Justice, dissenting from denial of appellant's motion for en-banc rehearing.

By this opinion, this Court creates the concept of comparative personal jurisdiction.[1] I dissent from the denial of en banc review.

The facts upon which the panel finds personal jurisdiction are extremely weak. The full Court should review both the legal and factual issues in this case.

I agree with the appellant that the panel should not have found personal jurisdiction over the appellant based on the panel's suggestion of additional evidence the appellant *could have* introduced. There is always room to speculate about additional proof. The underlying rationale of court proceedings is that a trial creates a closed universe upon which to base a decision. We should not rule in this case based on hypothetical evidence.

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[1] Because the full Court has refused to hear the case en banc, the decision of the panel constitutes the decision of the whole court. *O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 96 (Tex.1992).

Even if such evidence were available for review, I believe it would have little or no relevance. Evidence showing sales were low in other states, as compared to sales in Texas, should not be a factor to be considered in special appearance cases. Whether a defendant is involved in commerce in another state to a greater or lesser extent than in Texas should have no bearing on whether that defendant has subjected itself to the jurisdiction of Texas courts. Under the panel's rationale, almost every defendant in a special appearance case would find it necessary to present evidence of a comparative statistical analysis with other states.

I would grant en banc review.

APPENDIX C

[SEAL] **THE SUPREME COURT OF TEXAS**
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RE: Case Number: 00-0959
Court of Appeals Number: 01-99-00045-CV
Trial Court Number: 94-C-1392

Style: AMERICAN TYPE CULTURE COLLECTION, INC,
v.
MARSHALL COLEMAN, ET AL.

Dear Counsel:

Today the Supreme Court of Texas (Justice Rodriguez not sitting) denied the motion for rehearing in the above referenced cause.

Sincerely,

Andrew Weber, Clerk

by /s/ Patricia Cook
Patricia A. Cook
Chief Deputy Clerk

cc: Ms. Margie Thompson, Clerk
Ms. Jo Ann Salgado, District Clerk

APPENDIX D

NO. 94-C-1392

MARSHALL COLEMAN, ET AL	§	IN THE DISTRICT COURT OF BRAZORIA COUNTY, TEXAS 23RD JUDICIAL DISTRICT
VS.	§	
ABB LUMMUS CREST, INC., ET AL	§	

ORDER

(Filed Dec. 15, 1998)

On this 11th day of December, 1998, came on to be heard American Type Culture Collection's Special Appearance. The Court, after reviewing the pleadings and exhibits on file, and after hearing argument of counsel, is of the opinion that said Special Appearance is without merit and should be DENIED. It is; therefore,

ORDERED, ADJUDGED AND DECREED that the Special Appearance of Defendant, American Type Culture Collection, be and is hereby DENIED.

Signed and Entered 15th day of December, 1998.

/s/ Ben Hardin
PRESIDING JUDGE

APPENDIX E

Identity of Parties in the Texas Supreme Court
S.Ct. Rule 14(b)

The names of all of the parties in the Texas Supreme Court are as follows:

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EDISON RAMIREZ, GLORIA RAMIREZ, RICKY RAMIREZ, LISSETTE M. RAMOS-RAMON, MARTA M. RAM OS-SOTO, JOSE A. RAMOS (VALLES), CLAY RANKIN, STEPHANIE RANKIN, THOMAS H. RAWLINS, BERNARD V. RAY, GLENN E. RAY, SHARON L. RAY, HARLIE F. RAY, JR., DONALD P. RAY, SR., MARLIN L. RAYBOURN, MARTHA C. RAYBOURN, LUCY RAYFORD, OSCAR R. RAYFORD, SUSAN KING, individually and on behalf of the Estate of CHARLES KING, GLEN L. REDDIG, LAURA L. REDDIG, JAMES M. REED, WILLIE J. REESE, HENRY L. REESE, JR., PAMELA REEVES, RICHARD D. REEVES, WANDA L. REEVES, DWAIN M. REEVES, JR., WILLIAM P. REEVES, JR., LINDA R. REIDHAMMER, MICHAEL G. REIDHAMMER, SIEGMUND C. REINACH, WADE RENARD, MARIA M. RENTAS, JULIA L. REYES, MARGARITA REYES, RAFAEL P. REYES, LARRY L. REYNOLDS, JANICE RHODES, REX J. RHODES, CLARENCE C. RICE, DENNIS C. RICE, ELVIS R. RICH, SHARON RICHARDSON, individually and as next friend for her minor, child, FREDRICK M. RICHARDSON, CHERYL RIGGS, RUSSELL RIGGS, FRANCENE RILEY, individually and as next friend for her minor, child, DANIEL A. CROSS, MODESTO RIOS, MIGUEL A. RIOS-ACEVEDO, VICTOR RIVERA ARRIAGA, CACERES RIVERA CARMELO, MARGARITA RIVERA CATALA, CARMEN A. RIVERA ROSADO, MYRTA I. RIVERA ROSADO, SANDRA RIVERA SANTOS, LUIS A. RIVERA TORRES, MARIBEL RIVERA-OCASIO, JANICE ROBBINS, DOLLIE J. ROBERTS, EARL ROBERTS, LOUVINA ROBERTS, NICHOLAS E. ROBERTS, PAUL M. ROBERTSON, SON YO ROBERTSON, NORRIS R. ROBERTSON, SR., EARL ROBINSON, IRVIN B. ROBINSON, MICHAEL W. ROBINSON, EDWIN S. ROBLES, EDGAR RODRIGUEZ, EMILIO RODRIGUEZ, MARILYN RODRIGUEZ, MARK A. RODRIGUEZ, MIGUEL A. RODRIGUEZ individually and as next friend for his minor, child, LIZMAR

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individually and as next friend for his minor, child, JOSHUA D. SHERROD, CHARLES E. SHINE, FRANK J. SHINE, GLORIA M. SHINE, JAMES R. SHINE, LARRY D. SHOOP, DIANE L. SHORE, SCOTT O. SHORE, CHARLES A. SHORT, KATHY L. SIMMONS, TIMOTHY L. SIMMONS, MARY A. SIMPSON, CHERYL ANN SIANIS, NIKOLAOS MICHAEL SIANIS, BRIAN SKOTT, MARTA Z. SMIDA, BENJAMIN SMITH, CHARLES W. SMITH, CONNIE M. SMITH, GREGORY E. SMITH, INESTER SMITH, JOHNNY L. SMITH, KEITH A. SMITH, KENNETH J. SMITH, OLIVIA SMITH, PAMALYNN P. SMITH, STEVEN D. SMITH, CLAUDIO E. SMITH-ESMINEZ, MARILYN G. SMITH-ESMINEZ, DENNIS SMOTHERS, PEGGY SMOTHERS, BONNIE M. SNYDER, MATTHEW SNYDER, GERALD W. SOHN, SILKE SOOKBIRSINGH, HECTOR SOLER, MARIA DE LOURDES SOLIVAN, RUDY SOOKBIRSINGH, individually and as next friend for his minor, child, DOMINICK SOOKBIRSINGH, MARIA M. SOTO, WARREN D. SOULIER, JR., REGINA SPEIGHT, SYLVIA R. SPRINGER, TRAVIS D. SPROWL, individually and as next friend for his minor, child, TREVANTAE D. SPROWL, MICHAEL J. STACY, SHAWNA M. STACY, MICHAEL S. STALLINGS, JANET R. STAMM, EDDIE J. STANTON, LOIS STANTON, WILLIE JAMES STANTON, FRANK STEINER, IV, JAMES M. STENNIS, BERNADETTE M. STEPNEY, CAROLYN ANN STEWARD, ROGER STEWARD, SCOTT A. STONE, JOHN W. STOWE, ANGELA STRAUB, ARTHUR C. STREB, MARGARET STREB, ALBERT J. STRICKER, MARLIAN H. STRICKER, BETTY STRONG, CURTIS STRONG, TIMOTHY D. STUMP, BRIAN J. STYER, SANDY STYER, CYNTHIA T. SULLIVAN, DAVID B. SUMMERFORD, DONALD R. SUTTON, JOLENE A. SWANSON, KIM C. SWANSON, JENNIFER J. SWEIGERT, MICHAEL J. SWEIGERT, individually and as next friend for his minor, child, AUSTIN M. SWEIGERT, CYNTHIA B. SWORDS, RICHARD R. SWORDS, JOHN

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